Supreme Court, U.S.
FILED

97 1760 APR 28 1998

OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

Coastal Petroleum Company,

Petitioner,

v.

Honorable Lawton Chiles, et al., as and Constituting the Board of Trustees of the Internal Improvement Trust Fund, and as and constituting the Executive Board of the Department of Natural Resources of the State of Florida,

Respondents.

Petition for Writ of Certiorari to the District Court of Appeal, First District, State of Florida

---

PETITION FOR WRIT OF CERTIORARI

RICHARD A. EPSTEIN
1111 East 60th Street
Chicago, Illinois 60637
773-702-9563

SUSAN W. FOX
Macfarlane Ferguson & McMullen
Post Office Box 1531
Tampa, Florida 33601
813-273-4200

ROBERT J. ANGERER*
ROBERT J. ANGERER, JR.
ANGERER & ANGERER
Post Office Box 10468
Tallahassee, Florida 32302
850-576-5982

Attorneys for Petitioner
*Counsel of Record

29 pp

QUESTIONS PRESENTED

1) Does the Takings Clause of the Fifth Amendment to the United States Constitution protect petitioner's long-term oil and gas royalty on sovereignty submerged lands from outright confiscation by Florida?

2) Whether Florida impairs its own contractual obligations in violation of Art. 1, § 10 of the United States Constitution by refusing to enter into leases on sovereignty lands thereby rendering petitioner's royalty worthless?

3) Does *Dolan v. City of Tigard*, 512 U.S. 374 (1994), require Florida to establish "rough proportionality" between its absolute restriction on drilling for oil and gas, and the environmental perils that it seeks to avert?

4) Has Florida denied petitioner its royalty without the due process of law required under the Fourteenth Amendment to the Constitution when it declared petitioner's royalty "speculative" and therefore worthless, without allowing petitioner a fair opportunity to introduce evidence of its value?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the First District Court of Appeal of Florida and Supreme Court of Florida, below.

Pursuant to Supreme Court Rule 29.6, Coastal Petroleum Company, as a corporate filer, hereby lists Coastal Caribbean Oils & Minerals, Ltd. as its parent company.

TABLE OF CONTENTS

Page

Questions Presented.....i

List of Parties.....ii

Table of Authorities.....iv

Opinions Below.....1

Statement of Jurisdiction.....2

Constitutional Provisions Involved.....2

Statement of the Case.....3

Reasons for Granting Writ.....7

The decision below, by failing to protect the property interest created by the royalty conveyed by the State, conflicts with this Court's Takings Clause jurisprudence and presents an important Contract Clause question never addressed by this Court.....7

Conclusion.....20

TABLE OF AUTHORITIES

Page

CASES:

Askew v. Gables-by-the-Sea, Inc.,
333 So. 2d 56 (Fla. 1st DCA 1976).....15

Board of Regents v Roth,
408 U.S. 564 (1972).....8

Coastal Petroleum Co. v. Chiles,
Circuit Court of the Second Judicial Circuit,
in and for Leon County, Florida (1993).....2

Coastal Petroleum Co. v. Chiles,
656 So. 2d 284 (Fla. 1st DCA 1995).....2,6

Coastal Petroleum Co. v. Chiles,
Circuit Court of the Second Judicial Circuit,
in and for Leon County, Florida, (1996).....2

Coastal Petroleum Co. v. Chiles,
701 So. 2d 619 (Fla. 1st DCA 1997).....1,7,20

Coastal Petroleum Co. v. Chiles,
Fla. Supreme Court No. 91,956.....2

Conway Land, Inc. v. Terry,
542 So. 2d 362 (Fla. 1989).....8

De Monte Dunes at Monteray, Ltd. v.
City of Monteray
U.S. Supreme Court No. 94-16248.....14

Dolan v. City of Tigard,
512 U.S. 374 (1994).....i,14

Eastern Minerals International, Inc. v. United States,
36 Fed. Cl. 541 (1996).....13,14

Florida Wildlife Federation v. Department of Environmental Protection and Coastal Petroleum Co.,
Florida Division of Administrative Hearings Case Nos. 96-4222, 96-5038, 97-4362, 97-4591 (1998).....13

Federal Land Bank v. United States,
168 F. Supp. 788 (Ct. Cl. 1958).....12

Loretto v. TelePrompter,
458 U.S. 419 (1982).....9

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992).....8,9,15

Lynch v. United States,
292 U.S. 571 (1934).....10

Mafrige v. United States,
893 F. Supp. 691 (S.D. Tex. 1995).....12

Marine One, Inc. v Manatee County,
877 F.2d 892 (11th Cir. 1989), as modified, 898 F.2d 1490 (11th Cir. 1990).....15

Miller v. Carr,
188 So. 103 (Fla. 1939).....8

Montana Railway Company v. Warren,
137 U.S. 348 (1890).....17

Olson v. United States,
292 U.S. 246 (1934).....18

Penn Central Corp. v. City of New York,
438 U.S. 104 (1978).....16

Phillips v. United States,
243 F.2d 1 (9th Cir. 1957).....18

Ruckelshaus v. Monsanto Co.,
467 U.S. 986 (1984).....7,8,16

United States v. 4.553 Acres of Land,
208 F. Supp. 127 (N.D. Cal. 1962).....17

United States v. Silver Queen Mining Company,
285 F.2d 506 (10th Cir. 1960).....17,18

United States v. Winstar Corp.,
518 U.S. 839, 116 Sup. Ct. 2432 (1996).....7,10

United States Trust Co. v. New Jersey,
431 U.S. 1 (1977).....9,10,12

Watson v. Holland,
20 So. 2d 388 (Fla. 1945).....4

Webb's Fabulous Pharmacies Inc. v. Beckwith,
449 U.S. 155 (1980).....8

Welles v. Berry,
434 So. 2d 982 (Fla. 2d DCA 1983).....11,12

West River Bridge Co. v. Dix,
47 U.S. (6 How.) 507 (1848).....9,10

Zabel v. Pinellas County Water & Navigation Control Auth.,
171 So. 2d 376 (Fla. 1965).....15

CONSTITUTIONAL PROVISIONS:

Article I, Section 10,
United States Constitution.....i,3,7,14,19

Article X, § 6(a),
Florida Constitution.....5

Article X, § 11,
Florida Constitution.....6,14

Fifth Amendment,
United States Constitution.....i,2,6,14,17,19

Fourteenth Amendment, Section 1,
United States Constitution.....2,3,6,14,19

STATUTES:

Chapter 90-72, Laws of Florida (1990).....5,6,13

28 U.S.C. § 1257(a).....2

TREATISES:

Richard W. Hemingway, *Law of Oil and Gas*,
(3d Ed. 1991).....8,12

1 E. Kuntz, *The Law of Oil and Gas,* (1962).....11

2 H. Williams and C. Meyers, *Oil and Gas Law,*
§ 339.2 (1981).....11

OTHER MATERIALS:

Federal Offshore Statistics,
OCS Report MMS 97-0007, (1995).....13

Leigh Derenne Braslow, *Coastal Petroleum's Fight to Drill Off Florida's Gulf Coast,*
12 J. Land Use & Envtl. Law, 343 (1997).....13

Merrill, *Implied Covenants Between Others Than Lessors and Lessees,*
27 Wash. U. L. Rev. 155 (1942).....11

Alan Petzet, *Coastal lists Smackover, Sunniland Objectives in Gulf Off Florida,*
Oil & Gas J., Sept. 29, 1997.....18

Anne Reifenberg, *U.S. to Pay Oil Companies $200 Million To Drop Claims to Some Offshore Leases,*
The Wall Street J., Aug. 1, 1995.....18

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

Coastal Petroleum Company,

Petitioner,

v.

Honorable Lawton Chiles, et al., as and Constituting the Board of Trustees of the Internal Improvement Trust Fund, and as and constituting the Executive Board of the Department of Natural Resources of the State of Florida,

Respondents.

Petition for Writ of Certiorari to the District Court of Appeal, First District, State of Florida

---

PETITION FOR WRIT OF CERTIORARI

The Petitioner Coastal Petroleum Company seeks review of the November 5, 1997, judgment and opinion of the First District Court of Appeal, State of Florida.

OPINIONS BELOW

The opinion of the First District Court of Appeal, State of Florida, is reported at 701 So. 2d 619 (Fla. 1st DCA 1997), and is reprinted in the Appendix to this Petition, p. 1. The unreported order of the Supreme Court

of Florida declining to exercise discretionary jurisdiction to review the First District Court of Appeal's decision was rendered on January 28, 1998, and is reprinted in the Appendix, p. 34. The August 5, 1996, opinion of the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida after trial in case No. 90-3195, is unreported, but is reprinted in the Appendix, p. 13.

The prior July 23, 1995, opinion of the First District Court of Appeal, State of Florida reversing summary judgment is reported at 656 So. 2d 284 (Fla. 1st DCA 1995), and is reprinted in the Appendix, p. 35. The September 9, 1993, opinion of the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida granting summary judgment in Case No. 90-3195 is unreported, but is reprinted in the Appendix, p. 38.

STATEMENT OF JURISDICTION

Petitioner seeks review from the November 5, 1997, judgment and opinion of the First District Court of Appeal, State of Florida. Petitioner timely sought to invoke the discretionary jurisdiction of the Supreme Court of Florida. That Court declined to exercise its discretionary jurisdiction on January 28, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). This Petition is timely filed.

CONSTITUTIONAL PROVISIONS INVOLVED

". . . [N]or shall private property be taken for public use, without just compensation." Fifth Amendment, United States Constitution.

". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .."

Section 1, Fourteenth Amendment, United States Constitution.

"No State shall . . . pass any . . . Law Impairing the Obligation of Contracts . . .." Article 1, Section 10 United States Constitution.

STATEMENT OF THE CASE

This case addresses the right to protection under the Takings Clause of an oil and gas royalty created on January 6, 1976, by the final settlement of a lawsuit in United States District Court for the Southern District of Florida, between Coastal Petroleum Company and the State of Florida.

The origins of this dispute date back to December 27, 1944, and March 27, 1946, when Coastal Petroleum Company purchased Florida oil and gas Drilling Leases Nos. 224-A and 224-B from the State of Florida. Coastal Petroleum Company's (Coastal) Leases covered about 4,000,000 acres of State of Florida offshore sovereign lands. The leased properties ran from the shoreline to 10.36 miles offshore, and from just west of Apalachicola, along the Gulf Coast, to just south of Naples. (Map at App., p. 55). Under the Leases, Coastal had the exclusive right to explore for and produce oil and gas from the offshore lands for so long as Coastal met the drilling requirements and paid annual rentals or royalties. In return, the State received monetary compensation at the time the Leases were entered, required Coastal to pay annual rentals, and reserved a 1/8th royalty for itself, entitling the State to one barrel of oil out of every eight barrels produced, with no deduction for the costs of that production. The State of Florida also affirmed in the

Leases, that each leasehold conveyance was in the State's "best interest."

In *Watson v. Holland*, 20 So. 2d 388 (Fla. 1945), Florida's Attorney General challenged both Leases, but that challenge was rejected and the Leases held valid by the Florida Supreme Court. The Court in *Watson* also held that oil and gas drilling was not a nuisance. Thereafter Coastal and its partners began exploring Coastal's leasehold properties and by 1968 had spent more than $16,000,000. A total of eleven non-producing offshore wells were drilled by Coastal and its partners on the more than four million acres covered by the Leases. In 1968 the State again challenged the validity of these Leases, this time in United States district court in Miami, Florida. That court too upheld the validity of the Leases. On January 6, 1976, while the State's appeal was pending in the Court of Appeals for the Fifth Circuit, Coastal and the State of Florida agreed to a settlement that was made part of the consent decree of the federal court. (Settlement at App., p. 46).

The Settlement divided the 10.36 mile coastal strip into three lengthwise bands. (See map at App., p. 55) In the inner 4.36 mile strip (aqua in color on the map at App., p. 55), covering more than 2,100,000 acres, Coastal's original leasehold interest was converted to a 1/16th royalty, which gives Coastal 6.25 percent of any leasehold production without any deduction for the costs associated with finding and producing the oil or gas. That royalty was worth roughly half the value of Coastal's original leasehold interest.[1] The remainder of the Settlement divided the outer six mile band of the original Coastal Leases into two equal

---

[1] The calculation is as follows: the costs of production usually equal 3/4ths of the revenues received. A 1/8th royalty to the owner therefore leaves a 1/8th profit to the operating party.

three mile strips. The band running from 4.36 miles to 7.36 miles was returned to the State free and clear of all leasehold interests. The band running from 7.36 to 10.36 miles (blue in color on the map at App., p. 55) continued to be subject to Coastal's original leasehold interest, the State retaining its 1/8th royalty. Coastal also agreed that its royalty and leasehold interests only covered wells that started production within 40 years, or before 2016. During the 1968 to 1990 period, no oil and gas leases were executed on Coastal's royalty lands. However, in the late 1980's, after a natural gas discovery by Chevron off the Florida coast, Coastal sought seismic exploration permits from the State in order to further explore its lease areas at new horizons. The State granted such a permit to Coastal in 1990.

At the same 1990 meeting at which the permit was granted, the Florida land trustees adopted a general policy prohibiting drilling on offshore sovereign lands, including those covered by Coastal's leasehold and royalty. Later that year, the Florida Legislature codified that policy in Chapter 90-72, Laws of Florida, after noting that the increased interest by the oil and gas industry in exploring the outer continental shelf off the Florida Coast could pose environmental risks to Florida's Coastal waters. (App., at p. 56). The State offered Coastal no compensation for the royalty provided by the federal court settlement.

On July 23, 1990, Coastal filed a complaint for inverse condemnation against the State of Florida, claiming that the policy of the Florida land trustees and Chapter 90-72:

> . . . are an expropriation, confiscation and taking of Plaintiff's property, . . . without full compensation contrary to Article X, section 6(a) of the Florida

> Constitution . . . and, Article V and the Fourteenth Amendment to the Constitution of the United States which provides that property may not be taken without just compensation.

(Complaint of Inverse Condemnation, p. 8). Coastal claimed that the prohibition against new leases on the offshore sovereign lands totally destroyed its 1/16th royalty by precluding all leasing and drilling on the royalty property. The State moved for summary judgment on the ground that the public trust doctrine, added in 1970 to the Florida Constitution, Art. X, § 11, precluded Coastal's Fifth Amendment takings challenge.

Procedurally, both sides agreed to a bifurcated, non-jury trial confined solely to the issue of whether a "taking" of the royalty had occurred; only if that question was answered affirmatively would a jury be asked to resolve all valuation questions. The Florida Circuit Court then rejected Coastal's constitutional claims and granted the State summary judgment on the ground that its actions did not take Coastal's royalty. (App., at p. 38). On appeal that decision was reversed and remanded for trial. *Coastal Petroleum Co. v. Chiles*, 656 So. 2d 284 (Fla. 1st DCA 1995). (App., at p. 35).

On remand, a trial was held from May 6-10, 1996. In that non-jury bifurcated trial, the sole issue was whether the State of Florida had taken Coastal's royalty by passing Chapter 90-72, Laws of Florida. Neither side, however, presented any evidence of the royalty's actual value in 1990. Only the legal status, not the actual value, of the royalty had been placed in issue.

At the conclusion of the trial, the Circuit Judge held that the royalty had no value and therefore was not

constitutionally protected (i) because the State was under no duty to lease the covered lands, and (ii) because in light of the eleven nonproducing wells drilled on the 4,000,000 acres, the lack of leases executed from 1976-1990, and the public trust doctrine, the royalty's value was too speculative. (App., at p. 13). That decision was affirmed in the Florida First District Court of Appeal (App., at p. 1), despite Coastal's argument that this Court's recent decision in *United States v. Winstar Corp.*, 518 U.S. 839, 116 Sup. Ct. 2432 (1996), dealing with a "[f]ederal contract not even subject to the Contracts Clause," held that "a government cannot be permitted to nullify contractual rights by regulation or legislation," and required Florida to compensate Coastal for its royalty. (Coastal's Reply Brief to the First District Court of Appeal (1996) p.6).

Coastal filed a notice to invoke discretionary review in the Supreme Court of Florida. On January 28, 1998, that Court declined to exercise its discretionary jurisdiction.

REASONS FOR GRANTING WRIT

THE DECISION BELOW, BY FAILING TO PROTECT THE PROPERTY INTEREST CREATED BY THE ROYALTY CONVEYED BY THE STATE, CONFLICTS WITH THIS COURT'S TAKINGS CLAUSE JURISPRUDENCE AND PRESENTS AN IMPORTANT CONTRACT CLAUSE QUESTION NEVER ADDRESSED BY THIS COURT.

A. A Royalty Is a Protected Interest in Real Property under Florida Law. This Court has repeatedly been mindful

> . . . of the basic axiom that "'[property] interests . . . are not created by the Constitution. Rather, they

> are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Webb's Fabulous Pharmacies Inc. v. Beckwith*, 449 U.S. 155, 161 (1980), quoting *Board of Regents v Roth*, 408 U.S. 564, 577 [1972].

Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984).

In Florida, as elsewhere, royalties are uniformly recognized and protected as interests in real property. *Conway Land, Inc. v. Terry*, 542 So. 2d 362 (Fla. 1989), stated clearly "the interest was a presently vested interest in real property as it applied to unsevered oil, gas or minerals." *Id.* at 363.

> The appellee's estate was doubtless speculative in value, . . . [given] the possibility that there may in fact be no oil and gas within the land. In short, the typical contingent remainderman has an uncertain interest in the fee simple, while these appellees have a fee simple interest in the uncertain.

Conway, 542 So. 2d at 365. *See also Miller v. Carr*, 188 So. 103 (Fla. 1939). *See also* Richard W. Hemingway, *Law of Oil and Gas*, 57-59 (3d Ed. 1991).

B. Petitioner's Royalty Has Been Taken by Florida's Refusal to Lease the Covered Property. By refusing to permit any leases or drilling in the waters covered by the royalty, the State has deprived Coastal of the only viable economic use of its property. That action clearly implicates the takings clause no matter whether Florida's action is classified as a physical or regulatory taking. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). ("when the owner of real

property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.") In this instance, Florida's legislative refusal to accept any leasehold applications requires Coastal to sacrifice all of its economically beneficial uses, its royalty, for the common good.

Lucas began with the proposition that the value in property necessarily inhered in its productive use by the owner. Take all that value, and it is as though the property was gone. Indeed, compensation is required whether this situation is described as a regulatory taking or a possessory taking. Treated as a regulatory taking, the taking is total. Florida's legislative refusal to accept any leasehold applications is tantamount to retaking for itself the entire royalty without compensation. If regarded as a possessory taking, *Loretto v. TelePrompter*, 458 U.S. 419 (1982), makes clear that the permanent physical occupation of any portion of land constituted a taking no matter how much was left over. This case does not require the Court to choose between regulatory or possessory takings. Either way, compensation is required.

C. Florida's Refusal to Lease the Covered Property Impairs Its Obligation of Contract. In *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507 (1848), Vermont had conveyed by corporate charter the indefeasible right to build a bridge over the West River. When the State changed its mind, it was allowed to revoke the charter, but had to pay compensation for the losses so inflicted. The normal deference to state action is misplaced when the state is a party with a proprietary interest in the outcome. *See also, United States Trust Co. v. New Jersey*, 431 U.S. 1, 25-26 (1977), refusing to show deference to state actors

when New Jersey and New York sought to unilaterally abrogate their bond covenants to their own advantage.

The proper meaning of these cases has been clarified in *United States v. Winstar Corp.*, 518 U.S. 839, 116 Sup. Ct. 2432 (1996), which also refused to allow the United States to go back on its promise to count "supervisory good will" toward a bank's reserve requirements, thereby shutting it down. This Court noted "even though banking is one of the longest regulated and most closely supervised of public callings," the United States had to answer in damages when its shift in regulatory policy under FIRREA breached its contractual obligations. *Id.* 116 Sup. Ct. at 2440.

The Court relied heavily on contract clause cases, including *West River Bridge*, 116 Sup. Ct. at 2454, and *United States Trust*, 116 Sup. Ct. at 2466, n. 41, noting that "a stricter level of scrutiny applies under the Contract Clause when a State alters its own contractual obligations." The Court stressed

> . . . that allowing the Government to avoid contractual liability merely by passing any 'regulatory statute,' would flaunt the general principal that, 'when the United States enters into contract relations, its rights and duties therein are governed by the law applicable to contracts between private individuals.' *Lynch v. United States*, 292 U.S. [571] at 579.

Id. at 2473 (Breyer concurring).

Florida law unambiguously recognizes the owner's duty to make good faith efforts to lease royalty lands. Florida seeks to avoid this conclusion by claiming that its

refusal to entertain lease applications lies within its exclusive prerogative because nothing in the 1976 royalty agreement explicitly requires it to lease out the property to interested parties. As the Circuit Judge wrote: "If the parties had intended to bind the State to a condition that the land must be leased to an interested and qualified lessee, then certainly they could have included such a provision in the agreement." (App., at 18).

Yet most emphatically this is not the law in Florida, nor it appears anywhere else. The authoritative Florida decision on an owner's obligation to lease land for the benefit of the royalty interest is *Welles v. Berry*, 434 So. 2d 982 (Fla. 2d DCA 1983), which followed the general law that imposes on owners a good faith duty to lease the property covered by the royalty.

> "In all jurisdictions with expressions on the subject, with the possible exception of Louisiana, it has been held or assumed that the holder of the exclusive leasing power owes a duty to the owners of interest subject to such power . . ."
>
> Terminable or defeasible nonparticipating royalty interests are especially vulnerable to deliberate dilatory tactics of the executive to postpone actual production until after the terminal date of the interest.

Id. at 985, (quoting 1 E. Kuntz, *The Law of Oil and Gas* § 15.7, at 351 (1962)). *Welles* also cited: 2 H. Williams and C. Meyers, *Oil and Gas Law*, § 339.2 (1981). *See also* Merrill, *Implied Covenants Between Others Than Lessors and Lessees*, 27 Wash. U. L. Rev. 155 (1942).

The State Circuit Court sought to distinguish the State's contractual duties:

> . . . the obligation of the State cannot be compared to the obligation of a private party. . . . The State's interest here is not merely economic. [Rather] that policy was adopted to protect the environment, not to prevent Coastal from reaping a contingent profit."

(App., at p. 20). That reasoning was adopted in the District Court on Appeal: "the state, unlike private property owners, is not necessarily holding land in order to obtain an economic benefit." (App., at pp. 8-9).

Those conclusions completely contradict the prohibition of *United States Trust, supra*, that requires lesser deference when the State seeks to evade its own contractual obligations. Second, the doctrine of utmost good faith has been routinely applied to public owners as well as private owners. See, Hemingway, *Oil and Gas*, *supra*, at § 2.2 n. 54. Indeed *Welles* itself noted that the "case most often cited for the imposition of a covenant to use diligence in obtaining leases is *Federal Land Bank v. United States*, 168 F. Supp. 788 (Ct. Cl. 1958)," where the United States was the named defendant. *Welles*, at 986. *See also Mafrige v. United States*, 893 F. Supp. 691, 703 (S.D. Tex. 1995).

Third, there is no principled reason to depart from a rule that enjoys universal recognition on both private and public lands. The conflicts of interest identified above remain for both public and private owners. It is simply false to say that owners of private lands have only economic motivations at heart in deciding whether or not to enter drilling leases. The Florida courts have opportunistically reinvented the law concerning royalties to strip the petitioner of its vested rights.

Nor, finally, can the State of Florida hide its intransigent refusal to entertain drilling on the royalty lands behind the mantle of environmental protection. Environmental issues were already front and foremost when the State settled its dispute with Coastal in 1976. The State could have, but did not, choose to buy out Coastal's interest at that time. Furthermore, the State has a magnitude of restrictions on oil and gas drilling to protect the environment, as is evident in the recent decision of the Division of Administrative Hearings in *Florida Wildlife Federation v. Department of Environmental Protection and Coastal Petroleum Co.*, Division of Administrative Hearings, Case Nos. 96-4222, 96-5038, 97-4362, 97-4591. (App., at p. 62).[2]

The obligation of utmost good faith does not require the State to surrender its legitimate environmental concerns, but it does preclude the utter refusal to deal articulated in Chapter 90-72, just as it precludes the power of the State to sit and indulge in "extraordinary delay" in acting on a mining permit application, which was recently held to constitute a taking when the delay rendered plaintiff's leasehold interests valueless. *Eastern Minerals*

---

[2] In one breath the State insists that there is no oil to be found on the lease or royalty property. In the next breath it seeks to impose sureties of first $500 million, then $1.9 billion, and finally $4.25 billion to cover the costs of clean up of some hypothetical million barrel spill and natural resource damage. The Recommended amount of the surety was reduced to just under $225,000,000. (App. at p. 142). By way of comparison the worst domestic oil spill, at Santa Barbara in 1972, involved the release of 77,000 barrels. *See*, Leigh Derenne Braslow, *Coastal Petroleum's Fight to Drill Off Florida's Gulf Coast*, 12 J. Land Use & Envtl. Law, 343, 345-347 (1997). Federal regulations call for a maximum surety of $35 million. To date, from all the drilling from all federal sites in the Gulf, only 1000 barrels of oil have leaked into the environment, compared with 69,000 barrels released from 7 tanker spills in 1995 alone. *Federal Offshore Statistics*, OCS Report MMS 97-0007, Oil Pollution in U.S. and International Waters at 93 (1995).

International, Inc. v. United States, 36 Fed. Cl. 541, 549 (1996). Surely Florida is in no better position when it abandons subterfuge and flat-out refuses to enter into any leases on royalty lands.

D. The Decision Below Conflicts With The *Dolan* "Rough Proportionality" Test. The decision of this Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), makes clear the constitutional dimensions of this issue under the takings clause: Florida must show at least some "rough proportionality" between the ends it seeks and the restrictions it imposes. This Court has already granted a writ of certiorari in the *De Monte Dunes at Monteray, Ltd. v. City of Monteray*, No. 94-16248, to explore the meaning of that requirement in a land use case, in which the Ninth Circuit found that excessive land use restrictions totally destroyed the development potential of respondent's parcel. The identical issues arise in this case because the State has not even attempted to make the appropriate accommodations.

Nor does the public trust doctrine contained in the Florida Constitution allow the State to destroy petitioner's vested royalty interest. Article X, § 11 of the Florida Constitution provides:

> Title to lands under navigable waters, within the boundaries of the State, which have not been alienated . . . is held by the state, by virtue of its sovereignty, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest.

The Circuit Court held that this provision "prevents the state from entering into a non-repealable contract for the private use of sovereignty lands," and that "the state

must be left free to reevaluate, on a continuing basis, whether a previously allowed use of sovereign lands remains in the public's best interest." (App., at p. 23). Yet the public trust language cuts in exactly the opposite direction, for it expressly authorizes those conveyances which are deemed in the public interest. The public trust doctrine does not preclude conveyances of fee interests in sovereignty lands. See *Askew v. Gables-by-the-Sea, Inc.*, 333 So. 2d 56 (Fla. 1st DCA 1976), *Zabel v. Pinellas County Water & Navigation Control Auth.*, 171 So. 2d 376 (Fla. 1965). Nor does it preclude the creation of a royalty that the State found to be in the public interest. The State of Florida made that determination when it first issued the underlying leases in the 1940s and when the royalty was created in the 1976 Memorandum of Settlement.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992) this Court wrote that:

> In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically viable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

The same constitutional culture requires the protection of royalties from state machinations directed toward their destruction.

Petitioner's claim for compensation is not barred by *Marine One, Inc. v Manatee County*, 877 F.2d 892 (11th Cir. 1989), *as modified*, 898 F.2d 1490 (11th Cir. 1990). In that case the state was allowed to revoke a marine construction permit over public waters without paying

compensation on the ground that it was an impediment to navigation in public waters. But that case dealt only with a regulatory permit, and did not purport to invalidate a protected interest in real property, such as the royalty involved here.

Finally, Florida's actions have destroyed Coastal's "investment-backed expectations." *See Penn Central Corp. v. City of New York*, 438 U.S. 104, 124 (1978); *Ruckelshaus v. Monsanto*, 467 U.S. at 1005. The original leasehold agreement, and the 1976 Settlement were ordinary bilateral contracts, supported by consideration and fully enforceable as executory agreements. The settlement explicitly contemplated a 40-year base period for the royalty obligation, which petitioner could, and did, keep fully alive by making specified annual rental payments pocketed by the State. Within this institutional context, it would be the height of folly to protect the petitioner's interest only if it fomented other parties to demand leases or did so itself. The whole point of the 1976 agreement was to stabilize the expectations of both Florida and Coastal with respect to their future dealings. It is dangerous to now allow the State to unilaterally eliminate its obligations under the agreement without compensation for the property interest it thereby destroys. Looking backward, it allows the State to destroy the royalty. Going forward that position senselessly blocks the State from entering into binding bilateral executory contracts. Parties that have paid for their legal interests have, and should have, a reasonable expectation that these will receive constitutional protection.

E. Lower Courts Cannot Declare Interests In Real Property Worthless Without Allowing Their Holders An Opportunity To Present Evidence On Their Own Behalf. Finally, the decision of the Court below cannot be supported on the audacious ground that the royalty has been

shown to be worthless, by purporting to find that Coastal's royalty was worthless in light of the past historical record that showed unsuccessful drilling in the royalty lands before 1968 and the economic inactivity in them thereafter. (App., at p. 13). Petitioner recognizes that the State could make just this argument at the second phase of trial. But by the same token, elementary considerations of due process should have allowed it to offer evidence on the valuation issue before that issue was decided.

The difficulties in valuating a speculative interest do not allow the State to treat them as worthless under the Fifth Amendment to the Constitution. On this question, it is clear that while state law defines the definition of the property interest, "the quantum and method of proving just compensation is a federal question and is governed entirely by federal law." *United States v. 4.553 Acres of Land*, 208 F. Supp. 127 (N.D. Cal. 1962). Federal law uniformly rejects the proposition that the speculative value of unproved royalty and leasehold interests bars any constitutional claim for just compensation. Thus in speaking about the difficulties of valuation in condemning a mining claim, Justice Brewer observed, "uncertain and speculative as it is, such prospect has a market value, and the absence of certainty is not a matter which the railroad company [in its role as condemnor] can take advantage when it seeks to enforce a sale." *Montana Railway Company v. Warren*, 137 U.S. 348 (1890).

That rule has been consistently applied in subsequent federal cases. *See*, e.g., *United States v. Silver Queen Mining Co.*, 285 F.2d 506, 510 (10th Cir. 1960) ("Some speculation is inherent in the ascertainment of value of all resource property, be it mineral, oil, gas or otherwise, and if the quality of proof of value follows the

custom of the industry, is the best available, and is sufficient to allow the jury or court to make an informed estimate as to the fact of value, such proof is sufficient to meet the burden."); *see also Phillips v. United States*, 243 F.2d 1, 5 (9th Cir. 1957). ("The 'Element of Speculation' in Mineral Right Does Not Preclude their Having an Ascertainable Value."). These particular decisions follow inexorably from basic principles that this Court has long followed in the field.

> The guiding principle of just compensation is the reimbursement to the owner for the property interest taken. "He is entitled to be put in as good a position pecuniarily as if the property had not been taken. He must be made whole but is not entitled to more."

Olson v. United States, 292 U.S. 246, 255 (1934). So long therefore as plaintiffs' royalty is subject to exchanges between willing buyers and willing sellers, then the State cannot pretend that the value of that interest is simply zero.

In light of these principles, it is useful to mention but some of the evidence that petitioner could introduce in a full trial to show the value of their royalty if allowed to do so. The authoritative Oil & Gas Journal reports that Coastal believes that extensive amounts of oil could be extracted from its royalty lands.[3] Elsewhere off the Florida coast the United States government paid oil companies substantial sums to drop claims to leases that were acquired from the federal government in environmentally sensitive areas. *See* Anne Reifenberg, *U.S. to Pay Oil Companies $200 Million*

---

[3] "St. George Island prospect could hold 2.19 billion bbl in place. At 25% recovery, this would be a field of 618 million bbl ultimate recovery, requiring six platforms and 109 wells, Coastal said." Alan Petzet, *Coastal lists Smackover, Sunniland Objectives in Gulf Off Florida*, Oil & Gas J., Sept. 29, 1997, at 101.

To Drop Claims to Some Offshore Leases, The Wall Street J., Aug. 1, 1995. If leasehold claims could be worth millions, then why is Coastal's royalty dismissed as worthless? If Coastal's royalty is, apart from the State intransigence, worthless, then why has Coastal spent a small fortune to protect it? In the parallel proceeding concerning Coastal's offshore lease, Coastal introduced a team of credible experts to demonstrate the value of those properties. (App., at pp. 67-69). Such a showing could also be made at the valuation phase of this proceeding. This Court need not address any of these valuation questions to reverse the decision below. But it should order the Florida courts to recognize the constitutionally protected status of Petitioner's royalty and receive such valuation evidence before determining the royalty's actual value.

Petitioner has a protected real property royalty that Florida wishes to take without compensation. Florida justifies its actions by creating a separate law that allows it to destroy recognized property interests without compensation, and to repudiate its own grants in bad faith after the fact, and then offers before its own courts self-serving justifications for the destruction of these interests without compensation. The Fifth Amendment, Fourteenth Amendment and the Contracts Clause forbid Florida's effort.

CONCLUSION

Certiorari should be granted to review the judgment of the First District Court of Appeal, State of Florida in *Coastal Petroleum Company v. Honorable Lawton Chiles, et al.*, 701 So. 2d 619 (Fla. 1st DCA 1997).

Respectfully submitted,

RICHARD A. EPSTEIN
1111 East 60th Street
Chicago, Illinois 60637
773-702-9563

ROBERT J. ANGERER*
ROBERT J. ANGERER, JR.
ANGERER & ANGERER
Post Office Box 10468
Tallahassee, Florida 32302
850-576-5982

SUSAN W. FOX
Macfarlane Ferguson & McMullen
Post Office Box 1531
Tampa, Florida 33601
813-273-4200

Attorneys for Petitioner
*Counsel of Record

April 28, 1998

Supreme Court, U.S.
FILED

97 1760 APR 28 1998

OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

Coastal Petroleum Company,

Petitioner,

v.

Honorable Lawton Chiles, et al., as and Constituting the Board of Trustees of the Internal Improvement Trust Fund, and as and constituting the Executive Board of the Department of Natural Resources of the State of Florida,

Respondents.

Petition for Writ of Certiorari to the District Court of Appeal, First District, State of Florida

---

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

RICHARD A. EPSTEIN
1111 East 60th Street
Chicago, Illinois 60637
773-702-9563

SUSAN W. FOX
Macfarlane Ferguson & McMullen
Post Office Box 1531
Tampa, Florida 33601
813-273-4200

ROBERT J. ANGERER*
ROBERT J. ANGERER, JR.
ANGERER & ANGERER
Post Office Box 10468
Tallahassee, Florida 32302
850-576-5982

Attorneys for Petitioner
*Counsel of Record

148 pp

TABLE OF CONTENTS

PAGE:

Opinion of First District Court of Appeal, State of Florida.....1

Coastal Petroleum Co. v. Chiles et al, Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, Case No. 90-3195 (1996).....13

Supreme Court of Florida denial of Petition for Discretionary Review, Case No. 91,956.....34

Coastal Petroleum Co. v. Chiles, et al., 656 So. 2d 284 (Fla. 1st DCA 1995).....35

Coastal Petroleum Co. v. Chiles et al, Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, Case No. 90-3195 (1993).....38

Memorandum of Settlement.....46

Map showing royalty.....55

Chapter 90-72, Laws of Florida (1990).....56

Section 253.52, Florida Statutes.....60

Florida Wildlife Federation, et al., v. Department of Environmental Protection Coastal Petroleum Co., State of Florida, Division of Administrative Hearings, Recommended Order, Case Nos.: 96-4222, 96-5038, 97-4362, 97-4591 (April 8, 1998).....62

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CASE NO. 96-3035

COASTAL PETROLEUM,
A FLORIDA CORPORATION,

Appellant,

v.

HONORABLE LAWTON CHILES, ET AL.,
AS AND CONSTITUTING THE BOARD OF
TRUSTEES OF THE INTERNAL IMPROVEMENT
TRUST FUND OF THE STATE OF FLORIDA;
AND AS AND CONSTITUTING THE EXECUTIVE
BOARD OF THE DEPARTMENT OF NATURAL
RESOURCES OF THE STATE OF FLORIDA,

Appellees.

Opinion filed November 5, 1997.

An appeal from the Circuit Court for Leon County.
Philip Padovano, Judge.

John K. Aurell of Ausley and McMullen, Tallahassee; Susan W. Fox of MacFarlane, Ferguson & McMullen, Tampa; Robert J. Angerer and Robert J. Angerer, Jr. of Angerer & Angerer, Tallahassee, for appellant.

Robert A. Butterworth, Attorney General; Denis Dean, Chief, Special Projects; Jonathan A. Glogau, Assistant

Attorney General, Tallahassee, for appellees.

OPINION ON MOTION FOR REHEARING OR CERTIFICATION

WOLF, J.

Appellant's motion for rehearing is hereby granted; however, appellant's motion for certification is denied. Upon rehearing, we issue the following corrected opinion.

Coastal Petroleum Corporation (Coastal) appeals from a final judgment determining that Coastal was not entitled to relief pursuant to inverse condemnation. The trial court determined that a 1990 state statute prohibiting the exploration and drilling for oil in certain areas off the coast of Florida did not amount to a taking of Coastal's property interest in a percentage of royalties from oil taken from the area which was reserved as a result of a previous settlement agreement with the state. We concur in the sound reasoning of the trial court in determining that "[B]ecause of Coastal's lack of a reasonable expectation that the State would lease and its lack of ability to force the State to lease, the State's action in protecting its' [sic] sovereign submerged land by preventing exploration and drilling does not constitute a compensable taking of Coastal's reserved property interest." It is, therefore, unnecessary for us to reach the other reasons given by the trial court for denying Coastal's claim, and we affirm.

The history of this case dates back more than 50 years. On October 4, 1941, Arnold Explorations, Inc. signed an exploration contract and option to lease with the trustees of the Internal Improvement Fund. This contract gave Arnold the right to search for and produce oil and other minerals in lands owned by the state. Coastal Petroleum Company purchased Arnold Explorations in

1947. By that time the exploration contract had been modified into three separate leases--specifically, lease numbers 224-A and 224-B encompassed Gulf coast offshore areas, and lease number 248 covered Lake Okeechobee and other fresh water bodies. The offshore area defined in the leases runs from Apalachicola to six miles south of Naples, from the coast seaward 10.36 miles, an area corresponding to the territorial waters off Florida's west coast.

Before conducting drilling operations, the oil company or the operator of the project tries to determine where conditions are favorable for the formation and accumulation of oil and gas. The operator looks for basins, thick sediment accumulation where the conditions favor formation of oil and gas. A basin is defined as "prospective" if it has yielded or gives evidence that it might yield oil or gas. It is "condemned" if it yields evidence that oil and gas cannot exist.

After 1947, Coastal began to conduct geologic and seismic studies to locate oil and other minerals within the area covered by the leases. Thirteen wells were drilled, but Coastal did not find any oil or gas except in one location known as Forty Mile Bend which was an inland area not covered by the statute. Coastal was joined by The California Company and later by Mobil Oil Corporation. Together they drilled nine other offshore wells, but again no oil or gas was discovered. In all, more than $16,000,000 was spent on the leases before 1968. A great deal of information was gathered, but no oil was ever produced in the offshore area covered by the lease.

In the late 1960s, a dispute arose concerning Coastal's right to mine limestone beneath Lake Okeechobee. This dispute resulted in federal litigation between Coastal, the trustees, and the Army Corp of Engineers. The United States District Court for the

Southern District of Florida ruled in Coastal's favor and the trustees appealed. Settlement discussions began during the course of the appeal and continued until January 6, 1976, when the case was resolved. The agreement was reduced to writing in a memorandum of settlement between the state and Coastal dated January 6, 1976.

In the memorandum of settlement, Coastal surrendered a substantial portion of the area covered by the leases, agreeing to retain active rights to explore only in the most offshore portion of the original area to which the leases pertained (7.36-10.36 miles offshore). The "middle strip" (4.36-7.36 miles offshore) was surrendered by Coastal to the state (as specifically allowed by paragraph 16 of the leases, as modified), and Coastal retained no rights whatsoever to that area. Also, pursuant to section 16 of the lease, Coastal surrendered its interest in the near shore portion (coast to 4.36 miles offshore), retaining only a "residual royalty." The residual royalty interest entitled Coastal to 6.25 percent of all oil and gas produced on the offshore area until the year 2016. Additional conditions of the settlement required Coastal (1) to continue paying rentals on the areas where it retained an active interest; (2) to comply with environmental regulations in effect at the time of drilling; (3) to release any and all interests to the state in the year 2016 (unless production is ongoing); and (4) not to interfere in any state land use decisions.

The agreement is silent as to whether the trustees have a duty to cooperate with prospective lessees or whether the state may simply prohibit leasing, permitting, and drilling in the royalty areas. Coastal's royalty interest could produce a financial return only if an oil company were to lease the land within the area covered by the royalty interest and then only if the oil company were to locate and produce oil under the terms of the lease. However, the agreement does not contain any provision that

requires the state to lease any of the property. The president of Coastal Petroleum testified that he assumed the state had an obligation to lease the land as part of the overall agreement. Several witnesses testified for the state that the state retained the discretion as to whether to grant any leases.

The trial court made the following findings of fact:

> Some experts believed that the royalty area was "prospective" for oil in 1976 at the time of the settlement agreement. However, this opinion is refuted by experience. The years before the settlement were marked by one drilling failure after another. The lack of any real potential for the recovery of oil in sufficient quantities is further verified by events occurring after the settlement. During the 15-year period from 1976 to the filing of this suit in 1990, no third party had requested the state to grant any leases in Coastal's royalty area. Taking all of these facts into account, the court finds that the royalty area was not "prospective" for oil at the time of the 1976 memorandum of settlement.

On May 8, 1990, the Board of Trustees of the Internal Improvement Trust Fund and the Department of Natural Resources, now known as the Department of Environmental Protection, adopted the following policy:

> The policy of the Governor and Cabinet, sitting as the head of the Department of Natural Resources and as the Board of Trustees of the Internal Improvement Trust Fund, is to prohibit seismic activities using explosives and to prohibit the drilling, exploration, or production of oil and gas

> resources from structures located in the sovereign waters of the State of Florida, including bays, estuaries, freshwater lakes, rivers and streams.

The Florida Legislature in July of 1990 enacted chapter 90-72, Laws of Florida (section 377.242) which provided in pertinent part:

> After July 31, 1990, no oil or natural gas lease shall be granted, sold, or executed covering lands located north of 26°00'00" north latitude off Florida's west coast to the western boundary of the State bordering Alabama as set forth in s. 1, Art II of the State Constitution.

The legislation also provided that no structure intended for drilling production of oil, gas, or other structure may be constructed in the relevant areas.

Coastal then filed this lawsuit which alleged that chapter 90-72, Laws of Florida, effected a taking of Coastal's percentage interest in any royalty payments, and sought compensation for the alleged taking. Both parties moved for summary judgment and Coastal also moved for a partial summary judgment. Coastal's motions were denied and summary judgment in the state's favor was reversed by the First District Court of Appeal "[b]ecause genuine issues of material fact exist" Coastal Petroleum Co. v. Chiles, 656 So. 2d 284 (Fla. 1st DCA 1995).

After a nonjury trial, the trial court determined that (1) Coastal did not possess a property right which could constitute a basis for an action against the state for the purpose of eminent domain; (2) "because of Coastal's lack of a reasonable expectation that the State would lease and its lack of ability to force the state to lease, the State's action in protecting its sovereign submerged lands by

preventing exploration and drilling did not constitute a compensable taking of Coastal's reserved royalty interest," and (3) under the analysis adopted by the supreme court in Graham v. Estuary Properties, Inc. 399 So 2d 1374 (Fla.), cert. denied, 454 U.S. 1083, 102 S. Ct. 640, 70 L Ed. 2d 618 (1981), the 1990 legislation does not effect a taking of property. We agree with the trial court's determination as to the first two points; therefore, it is unnecessary to reach the third issue.

In determining whether a property owner has a right to recover damages pursuant to an action for inverse condemnation based on an enactment of a governmental regulation, it is necessary to determine (1) the nature and extent of the property interest held by the plaintiff; (2) whether that property interest is one which will entitle the landowner to protection pursuant to the laws of inverse condemnation; (3) the extent that the government's regulation interferes with the plaintiff's enjoyment or the protected property right; and (4) whether the governmental regulation effects a taking of property pursuant to the dictates of Graham v. Estuary Properties, supra. Normally, the focus in inverse condemnation actions are issues three and four. Our focus in the instant case is issues one and two. Because we find that the trial court correctly ruled as to issues one and two, it is unnecessary to deal with issues three and four.

Appellant correctly argues that in determining the extent of their property interest which was created pursuant to the settlement agreement in 1976, we must not only look at the agreement itself but the applicable law and constitutional provisions as they existed at the time of the agreement. See Board of Pub. Instruction v. Town of Bay Harbor Islands, 81 So. 2d 637, 643 (Fla. 1955). Coastal asserts that their interest in royalties from the disputed leases was unconditional because section

253.52, Florida Statutes (1975), created a duty to grant oil and gas leases on public lands on the part of the Board of Trustees of the Internal Improvement Trust Fund except under limited circumstances. We cannot agree with appellant, however, that this statutory provision created an unconditional obligation on the part of the state to lease the land for oil exploration if there is a demand and it makes economic sense to do so.

Section 253.52 provided, in pertinent part,

> **Placing oil and gas leases on market by board. -** Whenever in the opinion of the Board of Trustees of the Internal Improvement Trust Fund there shall be a demand for the purchase of oil and gas leases on any area, tract, or parcel of the land so owned, controlled, or managed, by any state board, department, or agency, then the board shall place such oil and gas lease or leases on the market in such blocks, tracts, or parcels as it may designate.

§ 253.52, Fla. Stat. (1975) (emphasis added). As explored in more detail later on, this statutory provision must be read in conjunction with the public trust doctrine contained in the constitution as well as the general police powers of the state to protect the public health, safety, and welfare.

Appellant relies on the case of Welles v. Berry, 434 So. 2d 962 (Fla. 2d DCA 1983), for the proposition that when a party is granted a royalty interest in oil, gas, and minerals, there is an implied covenant (of fair dealing) on the part of the grantor that they will continue to make good-faith efforts to lease the property so as to not defeat the interest of the holder of the royalty interest. Welles is inapplicable for a number of reasons. First, the state, unlike private property owners, is not necessarily holding

land in order to obtain an economic benefit. All state lands are held as a public trust.

The public trust doctrine is embodied in article X, section 11 of the Florida Constitution:

> The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest. Private use of portions of such lands may be authorized by law, but only when not contrary to the public interest.

Unlike Welles, the failure to lease in the instant case did not involve an attempt to defeat the royalty interest of Coastal.

In regard to the public trust doctrine, the trial court specifically found as follows:

> Under the reservation of the public trust doctrine, the state has an affirmative obligation to restrict or eliminate private activity on sovereign lands when such activity becomes contrary to the public interest. Article X, section 11, Florida Constitution confirms this obligation. The present situation is a clear example of action taken by the state pursuant to the public trust doctrine. The Florida Legislature determined in 1990 that future oil and gas drilling on sovereign lands in the near shore waters of the state would be detrimental and contrary to the public interest.... By enacting the law [90-73][sic] the Florida Legislature was merely exercising its constitutional authority to protect the lands held in trust for all the people.

(emphasis added).

In addition, unlike Welles, there is support in this case for the proposition that the parties understood that the trustees had the discretion to lease or not lease the land during the terms of the agreement. The public trust doctrine as well as the responsibility of the state to exercise their police powers for the good of the public support this position. The language of the agreement itself acknowledges the state's rights to control the use of the land in question. Finally, there is conflicting testimony by witnesses for the parties concerning the state's discretion to lease the area in question during the terms of the lease. It was within the trial court's discretion to resolve these conflicts in favor of the state.

The appellant argues, however, that even though the state may have been acting in the public trust in enacting chapter 90-72, Laws of Florida, any private property taken for public use, even under the public trust, is protected by the constitution and requires compensation. See Art. X, § 6A, Fla. Const. The appellant relies on Askew v. Gables-by-the-Sea, Inc., 333 So. 2d 56 (Fla. 1st DCA 1976), cert denied, 345 So. 2d 420 (Fla. 1977), and Zabel v. Pinellas County Water & Navigation Control Auth., 171 So. 2d 376 (Fla. 1965), for this proposition. Although appellant correctly argues that the public trust doctrine does not preclude a party from asserting that state regulation has resulted in a compensable taking of an interest in property obtained from the state, not all interests obtained from the state are entitled to the same constitutional protections

In Askew and Zabel, parties that had obtained fee title to sovereign submerged lands from the state were found to have a private property right which would be protected by the constitutional takings provision if the state precluded all reasonable use of the land. Similarly,

in State v. Leavins, 599 So. 2d 1326 (Fla. 1st DCA 1992), this court held that a lease which provided for the immediate taking of oysters from Apalachicola Bay was a valid property right entitled to protection.[1] Those cases are distinguishable, however, in that the interest in the instant case is not a fee interest as in Askew and Zabel, nor does this case involve an immediate right to remove presently existing resources as in Leavins.

In Marine One, Inc. v. Manatee County, 898 F.2d 1490 (11th Cir. 1996), the court ruled that certain interests in property obtained from the state are not sufficient to rise to the level of a protectable property interest under the law of inverse condemnation. In Marine One, the court found that a mere license or permit to use land was not a protected property right which could be taken where the interest was obtained subject to the public trust doctrine. See id. at 1492-1493. The interest in this case is more nebulous than the one identified in Marine One. In the instant case, Coastal retained a right to a royalty only if someone in the future decided to mine resources which may or may not exist in the area in question. In fact, during the 15-year period prior to the enactment of the law in question, no one had requested an oil lease in this area. In addition, in the period prior to the 1976 settlement, none of the numerous test oil wells drilled in this area had yielded any oil. The trial court therefore made the factual finding that this area was not prospective for oil.[2] As previously mentioned, the state retained the right to control land uses

---

[1] Leavins was not an inverse condemnation action, but a case where the regulation outlawing the use of any mechanized dredge or rake for purposes of taking oysters in Apalachicola Bay constituted unconstitutional impairment of existing contractual rights.

[2] We read the trial court's factual determination to indicate that based upon surrounding circumstances, it was purely speculative as to whether any oil existed in this area, a determination which is supported by the evidence contained in the record.

over the area in question. Under all the circumstances existing in this case, we conclude that the trial court was correct in determining the mixed question of law and fact that the interest of Coastal Petroleum in the land in question was too speculative to be protected through the means of inverse condemnation.

AFFIRMED.

JOANOS and VAN NORTWICK, JJ., concur.

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

Case No. 90-3195

COASTAL PETROLEUM COMPANY,
a Florida Corporation,

Plaintiff,

vs.

HONORABLE LAWTON CHILES, *et al.,* as and constituting the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida; and as and constituting the Executive Board of the Department of Environmental Protection,

Defendants.

FINAL JUDGMENT

This is an action for damages for inverse condemnation. Coastal Petroleum contends that a state statute prohibiting the exploration and drilling for oil in certain areas off the coast of Florida amounts to a taking of its interest in royalties reserved under an previous settlement agreement with the State. The parties agreed to bifurcate the proceedings and to present the taking issue in a nonjury trial. For the reasons that follow, the court concludes that there was no taking of any property right. Therefore, it is not necessary to conduct a trial on the issue of damages. The court renders judgment for the

State.

I

FINDINGS OF FACTS

The history of this case dates back more then fifty years. On October 4, 1941, Arnold Explorations, Inc. signed an exploration contract and option to lease with the Trustees of the Internal Improvement Fund. (Plaintiff's Exhibit 18). This contract gave Arnold the right to search for and produce oil and other minerals in lands owned by the State. Coastal Petroleum Company purchased Arnold Explorations in 1947 and by that time the exploration contract had been modified into three separate leases. Specifically, Lease Numbers 224-A and 224-B encompassed Gulf coast offshore areas and Lease Number 248 covered Lake Okeechobee and other fresh water bodies. The offshore area defined in the leases runs from Apalachicola to six miles south of Naples, from the coast seaward 10.36 miles, an area corresponding to the territorial waters off Florida's west coast.

Before conducting drilling operations, the oil company or the "operator" of the project tries to determine where conditions are favorable for the formation and accumulation of oil and gas. The operator looks for basins, thick sediment accumulation, where the conditions favor formation of oil and gas. A basin is defined as "prospective" if it has yielded or gives evidence it might yield oil or gas. It is "condemned" if it yields evidence that oil and gas cannot exist.

After 1947 Coastal began to conduct geologic and seismic studies to locate oil and other minerals within the area covered by the leases. Thirteen wells were drilled but Coastal did not find any oil or gas except in one well at a location known as Forty Mile Bend. Coastal was joined by

The California Company and later by Mobil Oil Corporation. Together they drilled nine other offshore wells, but again no oil or gas was discovered. In all, more than $16,000,000 was spent on the leases before 1968. A great deal of information was gathered, but no oil was ever produced.

In the late 1960s a dispute arose concerning Coastal's right to mine limestone beneath Lake Okeechobee. This dispute resulted in federal litigation between Coastal, the Trustees, and the Army Corp of Engineers. The United States District Court for the Southern District of Florida ruled in Coastal's favor and the Trustees appealed. Settlement discussions began during the course of the appeal and continued until January 6, 1976, when the case was resolved. The agreement was reduced to writing in a Memorandum of Settlement between the State and Coastal dated January 6, 1976. (Plaintiff's Exhibit 131).

In the Memorandum of Settlement, Coastal surrendered a substantial portion of the area covered by the leases, agreeing to retain active rights to explore only in the most offshore portion of the original area to which the leases pertained (7.36 -10.36 miles offshore) . The "middle strip" (4.36 -7.36 miles offshore) was surrendered by Coastal to the State (as specifically allowed by paragraph 16 of the leases, as modified) and Coastal retained no rights whatsoever to that area. Also, pursuant to section 16 of the lease, Coastal surrendered its interest in the nearshore portion (coast to 4.36 miles offshore) retaining only a "residual royalty".[3] The residual royalty interest entitled

---

[3] Additional conditions of the settlement required Coastal (1) to continue paying rentals on the areas where it retained an active interest; (2) to comply with environmental regulations in effect at the time of drilling; (3) to release any and all interests to the State in the year 2016

Coastal to 6-1/4% of all oil and gas produced on the offshore area until the year 2016.

The agreement is silent as to whether the Trustees have a duty to cooperate with prospective lessees or whether the State may simply prohibit leasing, permitting, and drilling in the royalty areas. Coastal's royalty interest could produce a financial return only if an oil company were to lease the land within the area covered by the royalty interest and then only if the oil company were to locate and produce oil under the terms of the lease. However, the agreement does not contain any provision that requires the State to lease any of the property. The president of Coastal Petroleum testified that he assumed the State had an obligation to lease the land as a part of the overall agreement.

Some experts believed that the royalty area was "prospective" for oil in 1976 at the time of the settlement agreement. However, this opinion is refuted by experience. The years before the settlement were marked by one drilling failure after another. The lack of any real potential for the recovery of oil in sufficient quantities is further verified by events occuring [sic] after the settelement [sic]. During the 15-year period from 1976 to the filing of this suit in 1990, no third party had requested the State to grant any leases in Coastal's royalty area. Taking all of these facts into account, the court finds that the royalty area was not "prospective" for oil at the time of the 1976 Memorandum of Settlement.

On May 8, 1990, the Board of Trustees of the Internal Improvement Trust Fund and the Department of Natural Resources, now known as the Department of Environmental Protection, adopted the following policy:

(unless production is ongoing); and (4) not to interfere in any State land use decisions.

> The policy of the Governor and Cabinet, sitting as the head of the Department of Natural Resources and as the Board of Trustees of the Internal Improvement Trust Fund, is to prohibit seismic activities using explosives and to prohibit the drilling, exploration, or production of oil and gas resources from structures located in the sovereign waters of the State of Florida, including bays, estuaries, freshwater lakes, rivers and streams.

The Florida Legislature in July of 1990 enacted Ch. 90-72, Laws of Florida (§ 377.242) which provided in pertinent part:

> After July 31, 1990, no oil or natural gas lease shall be granted, sold, or executed covering lands located north of 26°00'00" north latitude off Florida's west coast to the western boundary of the State bordering Alabama as set forth in s. 1, Art II of the State Constitution.

Coastal then filed this lawsuit and in their Amended Complaint alleged that the Law adopted by the legislature effected a taking of Coastal's percentage interest in any royalty payments, and sought compensation for the alleged taking. Both parties moved for summary judgment and Coastal also moved for a partial summary judgment. Coastal's motions were denied and summary judgment in the State's favor was reversed by the First District Court of Appeal "[b]ecause genuine issues of material fact exist". The case was remanded to this court for further proceedings. Coastal Petroleum Co. v. Chiles, 656 So. 2d 284 (Fla. 1st DCA 1995).

II

CONCLUSIONS OF LAW

A. Covenant of "Utmost Fair Dealing"

The first issue the court must decide is whether there is an implied condition in the 1976 Memorandum of Settlement that requires the State to lease the lands that are the subject of Coastal's royalty interest. Having considered the terms of the agreement in light of the circumstances existing at the time the agreement was made, the court concludes that there was not such an implied condition.

Nothing in the text of the 1976 Memorandum of Settlement requires the State to lease the land. Coastal did not bargain for the right to force the State either to grant a lease or to actively seek oil and gas in the royalty area.[4] On its face the agreement has the following effect: if there is demand for a lease, and if the State, in the future, leases land in the royalty area and if oil, gas, or other minerals are recovered, then Coastal would be entitled to 6.25% of the value of those minerals. The reserved royalty was only part of the consideration flowing to Coastal and it pertains only to the nearshore area within the original leases. As to this area, Coastal received only a conditional right to profits that might be derived from oil production in the future. If the parties had intended to bind the State to a condition that the land must be leased to an interested and qualified lessee, then certainly they could have included such a provision in the agreement.

---

[4] In Section Four of the 1976 Memorandum of Settlement titled, "Specific Provisions of Surrender and Release", Coastal surrendered its interest in the 4.36 miles seaward from the west coast of Florida but retained a "residual royalty of 6 1/4%."

The royalty interests created by the agreement is known in the oil industry as a "non-participating royalty" and may be defined as an interest in the gross production of oil, gas and other minerals carved out of the mineral fee estate as a free royalty, which does not carry with it the right to participate in the execution of, the bonus payable for, or the delay rentals to accrue under, oil, gas and mineral leases executed by the owner of the mineral fee estate. Conway Land, Inc. v. Terry, 542 So. 2d 362 (Fla. 1989). The exclusive leasing privilege remaining in the mineral fee owner is commonly referred to and known as the "executive right". Terry v. Conway Land, Inc., 508 So. 2d 401 (Fla. 5th DCA 1987).

Coastal argues that the State has a duty to lease the land under Section 252.52 [sic] Florida Statutes, (1975), which was in effect at the time of the Memorandum of Settlement. However, this statute merely requires the state to lease the land only when "in the opinion of the Board of Trustees . . there shall be a demand for the purchase of oil an gas leases." (emphasis added) . At most, the statute created a conditional obligation that would come into being if the Trustees thought there was a demand for oil and gas leases. As the evidence in this case shows, there were no oil and gas leases even before the 1990 legislation.

Coastal also contends that even though the agreement does not contain an express duty to lease the land, there is an obligation of "utmost fair dealing" which requires the State to lease the land for the production of oil and gas. In support of this argument, Coastal relies on the decision in Welles v. Berry, 434 So. 2d 982 (Fla. 2d DCA 1983), the leading case on the duty of fair dealing in oil and gas leases. In Welles, the court recognized that there are some situations in which a duty to lease can be implied. If the intent of the parties warrants application of an implied covenant of "utmost fair dealing" and if the mineral estate

holder's conduct is sufficiently egregious to result in a breach of the implied covenant for failure to act as a reasonable prudent landowner, then the royalty owner has an action against the landowner for a breach of the agreement.

The decision in Welles does not support Coastal's position in this case. That is so because the obligation of the State cannot be compared to the obligation of a private party. The duty imposed on a "reasonably prudent landowner" involves only economic considerations flowing from the prospective lease; if the lessee makes a fair and reasonable proposal, the landowner cannot turn it down arbitrarily merely to defeat a royalty interest. This was the situation in Welles. As a result of related litigation, the landowner simply refused to lease the property to any operator thereby defeating any possible profit to the royalty owner. However, the State's interest here is not merely economic. The state policy embodied in the 1990 legislation makes it more difficult to produce oil in the nearshore waters, but that policy was adopted to protect the environment, not to prevent Coastal from reaping a contingent profit

There is no justification for imposing an implied condition in this case because the parties did not enter into the agreement with an expectation that the State would be required to engage in a business venture to produce oil in the nearshore area. Section 3, Part D of the 1976 Settlement Agreement states that:

> Coastal shall have no right to intervene in any land use decisions within the areas leased other than as to the outermost three miles retained by Coastal.

Coastal surrendered its rights to the Trustees, including the decision as to whether or not new leases would be granted.

The granting of new leases is a "land use decision".

There would be no breach of a duty of utmost fair dealing even if the "reasonably prudent landowner" standard could be applied to the State in this case. It could not be said that the State acted imprudently by failing to recognize the potential economic benefit that could be derived from oil production in the nearshore areas. No oil company came forward to request a lease during the entire fourteen-year period between the 1976 agreement and the 1990 legislation. A practical view of this evidence suggests that the State was not acting arbitrarily or with some intent to harm Coastal Petroleum. On the contrary, the regulations imposed by the 1990 legislation did not take anything. As the history of this case has shown, the opportunity to make a profit from the production of oil in the nearshore area did not exist in the market in any event.

In summary of this point, the court concludes that the agreement does not require the State to lease the property, and that there is no basis to engraft an implied condition that the state must lease the land. Therefore, the reserved royalty interest is not a right that was "taken" by the laws prohibiting exploration and production of oil in the nearshore area, and there is no basis for an action against the State for inverse condemnation. That alone ends the inquiry in this case. However, the judgment of the court can also be supported on other independent grounds. These are discussed below.

B. The Public Trust

Even if the court could imply an obligation on the part of the State to lease the land to an oil company, the 1990 legislation restricting exploration and drilling in the nearshore area is not a "taking" of Coastal's royalty interest. That is so because the decision is one that was

made in the public trust.

In 1970, six years before the execution of the Memorandum of Settlement, the people of Florida adopted Art. X, § 11, Fla. Const., which provides:

> Title to lands under navigable waters, within the boundaries of the State, which have not been alienated . . . is held by the state, by virtue of its sovereignty, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest.

This Amendment was "largely a constitutional codification of the public trust doctrine contained in [Florida] case law." Coastal Petroleum v. American Cyanamid, 492 So. 2d 339, 344 (Fla 1986). The First District Court of Appeal in Bd. of Trust. of Int. Improv. Trust v. Levy, 656 So. 2d 1359, 1361 (Fla. 1st DCA 1995) recognized the public trust doctrine as a:

> Principle derived from the English common law, incorporated into the organic law of this state pursuant to a constitutional amendment in 1970, followed by legislative action authorizing private use of portions of sovereignty lands under navigable waters when not contrary to the public interest.

In American Cyanamid, the court specifically recognized that the public trust doctrine has been part of Florida law since 1893 when the Florida Supreme Court expressly adopted the U.S. Supreme Court's formulation of the doctrine. State v. Black River Phosphate Co., 13 So. 640 (Fla. 1893) (quoting Illinois Cent. R.R. Co. v. State of Illinois, 146 U.S. 387, 451-52, 13 S.Ct.110

(1892).

Illinois Central, the applicability of which was again specifically confirmed by the Florida Supreme Court in American Cyanamid, is significant because there, the state legislature granted the railroad company a perpetual fee to construct a project on state sovereignty lands A later legislature annulled the agreement for public policy reasons. The railroad company sued, arguing that it had vested rights to the sovereignty lands in question which could not be subsequently revoked. The Supreme Court upheld the validity of the legislation and determined that the railroad held only a revocable license. The Court concluded that the license was revocable because the public trust doctrine prevents the state from entering into a non-repealable contract for private use of sovereignty lands. Dismissing any argument that the legislature's actions may have violated the taking provisions of either the federal or state constitution, the Court reasoned that the state must be left free to reevaluate, on a continuing basis, whether a previously allowed use of sovereignty lands remains in the public's best interest. The public trust requires freedom so that subsequent legislatures can respond to varying circumstances and present exigencies as they arise. Illinois Central, at 450-62.

When the State acts in its sovereign capacity to manage and regulate sovereignty lands held in trust by the State for the benefit of the people, the constitutional prohibition against taking property without compensation is not implicated. Marine One Inc. v. Manatee County, 877 F. 2d 892 (11th Cir. 1989), clarified, affirmed and petition for reh. den., 898 F. 2d 1490 (11th Cir. 1990) (Second Opinion) (determining that the public trust doctrine, as construed by the Florida Supreme Court in American Cyanamid, and not takings law, governs question of whether license or permit can be revoked without payment

of compensation). See, also, Osborne v. United States, 145 F. 2d 892 (9th Cir. 1944) (Permits issued by a sovereign may be highly valuable as between private persons but . . . may be revoked by the sovereign without payment of compensation)

As the Eleventh Circuit noted in Marine One, the limitations imposed by the public trust doctrine have been incorporated into Coastal's leases since their creation as a matter of law, because the leases apply to sovereignty lands. Marine One, at 1492. See also, Black River at 645-46 and Coastal Petroleum v. Sec of the Army, (Defendant's Exhibit 1).

The issue in Marine One was whether the plaintiffs had a property interest protected by either the Fifth Amendment's prohibition against taking private property without just compensation or the Fourteenth Amendment's requirement of substantive due process. The court concluded that plaintiffs' property interest was not protected because the public trust doctrine required its taking. Marine One turned on a question of State law, namely, the parameters of the plaintiffs' property interest. Marine One Inc. v. Manatee County, (Second Opinion) 898 F.2d 1490, 1492 (11th Cir. 1990), "[s]tate law creates and defines the parameters of a plaintiff's property interest".

In an earlier case, the United States District Court for the Southern District of Florida, in Coastal Petroleum Company v. Secretary of the Army, No. 68-951-Civ-CA and 69-699-Civ-CA (consolidated), issued a final order in a case wherein Coastal and the State of Florida were parties. In the order, Judge Atkins specifically held that Coastal's "leases" were limited by application of the public trust doctrine. In describing the relationship between the State and Coastal, the court concluded that:

The relationship of the Trustees to Coastal is not as

> tenants in common or joint tenants but rather as grantor and grantee with the grantor holding a reservation clause. The reservation clause, of course, is the trust doctrine. Coatal [sic] Petroleum v. Secretary of the Army, (Defedant's Exhibit 1).

Under the reservation of the public trust doctrine, the State has an affirmative obligation to restrict or eliminate private activity on sovereign lands when such activity becomes contrary to the public interest. Article X, § 11, Fla. Const. confirms this obligation. The present situation is a clear example of action taken by the State pursuant to the public trust doctrine. The Florida Legislature determined in 1990 that future oil and gas drilling on sovereign lands in the nearshore waters of the State would be detrimental and contrary to the public interest.

At the time of the execution of the Memorandum of Settlement, Coastal returned its drilling rights in the royalty area to the State, reserving only the "residual royalty interest." The land to which the "residual royalty interest" attached remained subject to the public trust doctrine and, therefore, a decision by the State to lease that property or convey any interest therein would necessarily be limited by the doctrine. Art. X, § 11, Fla. Const., in effect for several years prior to execution of the Memorandum of Settlement, forbade alienation of any sovereignty land absent an affirmative declaration that such alienation would not violate the public trust. In order for a lease to be granted, the Trustees would have to determine that it is in the public interest. Under these circumstances, Coastal's reservation of the royalty interest not only failed to create a duty on the part of the State to lease, but failed to contain any reasonable expectation that the State would lease in the future.

By enacting the Law, the Florida Legislature was merely exercising its constitutional authority to protect the lands held in trust for all the people. Because of Coastal's lack of a reasonable expectation that the State would lease and its lack of ability to force the State to lease, the State's action in protecting it's sovereign submerged lands by preventing exploration and drilling does not constitute a compensable taking of Coastal's reserved royalty interest. Since the Law was adopted to prevent harm to Florida's environmentally sensitive sovereign lands, the State has fulfilled its duty under the public trust doctrine. Coastal therefore cannot be heard to challenge the propriety of the State's actions.

C. Inverse Condemnation

The law of inverse condemnation would not allow a recovery in this case in any event because the 1990 legislation does not effect a taking of property. Irrespective of the public trust issue, the circumstances of this case would not warrant a conclusion that the legislation restricting exploration and drilling in the nearshore waters of the State amounts to a taking of Coastal's royalty interest.

In Graham v. Estuary Properties, Inc., 399 So. 2d 1374 (Fla. 1981), set forth the criteria in a takings case predicated on a statutory enactment, as follows:

> 1. Whether there is a physical invasion of the property.
>
> 2. The degree to which there is a dimunition [sic] in value of the property. Or stated another way, whether the regulation precludes all economically reasonable use of the property.

3. Whether the regulation confers a public benefit or prevents a public harm.

4. Whether the regulation promotes the health, safety, welfare, or morals of the public.

5. Whether the regulation is arbitrarily and capriciously applied.

6. The extent to which the regulation curtails investment-backed expectations.

The application of these criteria to the facts of this case reveals that there was no taking. Each factor is discussed below.

1. Physical Invasion of the Property. The legislation does not impose any physical invasion of the property. The area covered by Coastal's royalty interest is and always has been the property of the State.

2. Preclusion of Economically Reasonable Use. The 1990 legislation does not have the effect of precluding all economic use of Coastal's royalty interest. There is no absolute right for a landowner to gain a profit from an investment in land. Williamson Co. Regional Planning v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). As a result, the courts have established another criteria that must be established for a successful takings claim. In Estuary Properties, the Florida Supreme Court framed the controlling question as "whether the regulation precludes all economically reasonable use of the property." Estuary Properties at 1380 (emphasis added) . That same year, the First District Court of Appeal in Leon County v. Smith, 397 So. 2d 362, 363 (1st DCA 1981), held that action must render, "the

land useless and permanently deprive plaintiffs of all beneficial enjoyment thereof". (emphasis added) . More recently in State. Department of Environmental Protection v. Burgess, 667 So. 2d 267, 270 (Fla. 1st DCA 1995), the court reaffirmed the principle in an inverse condemnation case involving the denial of a permit. The court said:

> [I]n considering whether the permit denial deprived Burgess of all economically beneficial use of his property, the trial court must weigh evidence relating to numerous issues, including Burgess's knowledge and expectations when he purchased the property and whether all feasible economic use has been denied by the permit denial . . . (emphasis added).

The 1990 legislation does not prohibit the mining of oil under the surface of the land beneath the nearshore water of Florida; it merely prohibits drilling leases in those areas. There is still a good possibility that an operator could employ the technique of "directional drilling" to produce oil from a well that begins on land at a point beyond the prohibited area. This process is more expensive but it also has the potential to produce greater quantities of oil. As the State's expert testified, some of the largest offshore oil wells in the world were drilled horizontally from points originating on dry land.

Coastal maintains that directional drilling would not be economially [sic] feasible because the revenue margin of 6.25 percent is too small to cover the cost. This argument misses the point. The development costs of exploring for oil and the production costs incurred in taking the oil out of the earth are borne by the operator out a much larger share of the revenues produced. The exploration costs and production costs would not be deducted from the 6.25

royalty interest in any event The operator is entitled to a much larger share of the revenues, (75% as shown by Coastal's Exhibit 338), and experience with oil companies throughout the world has shown that many operators find it economially [sic] feasible to produce oil through the technique of directional drilling. The evidence in this case suggests that the lack of drilling activity in the nearshore waters has more to do with the failure to produce hard evidence that oil exists in those areas in sufficient quantities, than it does with the costs associated with directional drilling.

3. Public Benefit or Prevention of Public Harm. The 1990 legislation was clearly designed to impose regulations that promote the good of the public at large and to prevent the harm that might be done by commercializing a natural resource. Recently, the Florida Supreme Court in Dept. of Community Affairs v. Moorman, 664 So. 2d 930, 932 (Fla. 1995), reiterated that:

> [T]he state does in fact have a right to use its police power to establish land-use regulations addressing environmental concerns. Graham v. Estuary Properties, 399 So. 2d 1374, 1381 (Fla.), cert. denied, 454 U.S. 1083, 102 S. Court. 640, 70 L.Ed.2d 618 (1981) . . . as the constitution itself states:It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Art. II, § 7, Fla.Const. There is an obvious public interest in such a policy, given the fact that environmental degradation threatens not merely aesthetic concerns vital to the state's economy but also the health, welfare and safety of substantial numbers of Floridians. Sarasota v. Barg, 302 So.2d 737 (Fla. 1974).

The protection of natural resources is the constitutionally declared public policy of the State of Florida, enforceable by the police powers. Florida Power Corp. v. Gulf Ridge Council, 385 So. 2d 1155 (Fla. 2d DCA 1980). In Askew v. American Waterways Operators, Inc. 411 U.S. 325, 93 S.Ct. 1590, (1973), the United States Supreme Court approved the power of the State of Florida to control oil spillage. The law prevents the possible harm from oil development and advances the health safety and welfare of the public.

4. Public Health, Safety, and Welfare of the Public. Under the circumstances presented here, the analysis of this is factor is the same as that of the preceding factor.

5. Arbitrary or Capricious Regulations. The 1990 legislation is not arbitrary or capricious. It was enacted for a valid purpose and it applies in all of the territorial waters, not merely those in which Coastal has reserved a residual royalty interest.

6. Curtailment of Investment-Backed Expectations. The 1990 legislation does not curtail an investment-backed expectation, first because the royalty interest itself is merely a possibility and not an expectation, and second because there was no investment.

In Estuary Properties, the Florida Supreme Court construed the "investment-backed expectation" prong of a takings analysis. Specifically, the court considered the extent to which an environmental land and water management regulation encroached upon a claimant's investment-backed expectations. The court held that the claimant's investment was backed only by its own subjective expectation that the land could be developed as desired. Estuary Properties at 1383. Any investment-backed expectations on Coastal's part, regarding its ability to obtain royalties must be viewed as purely subjective due to the environmentally sensitive nature of the lands and

waters affected by such activities and the laws and regulations in place restricting the royalty area's use. According to Estuary Properties, it is unreasonable to have such expectations when the delicate environmental condition of Florida's submerged sovereignty lands conflict with private interests. Thus, even if Coastal in fact had any expectations regarding the royalty area, such expectations cannot factor into the analysis in this case because they are purely subjective and therefore unreasonable, per Estuary Properties.

Recovery of any profits from the reserved royalty interest would be purely speculative. In fact, there were many obstacles to a potential recovery of profits even before the 1990 legislation. First, there would have to be an operator willing to advance the costs of exploring for oil in the nearshore area. Second, the operator would have to reach a reasonable agreement to lease the land from the state. Third, it would have to be economically feasable [sic] for the operator to produce the oil without violating land regulations in existence at the time of the lease. Fourth the operator would have to actually strike oil. As this analysis reveals, Coastal's opportunity to recover a profit from oil produced in the nearshore area depends a series of possibilities, one stacked on another. This is not what the court was referring to in Estuary Properties, as an investment-backed expectation. Furthermore, the fact that there has been no oil produced in the nearshore area at any time during the history of Coastal's relationship with the Trustees is another good indicator that Coastal had no reasonable expectation of obtaining a profit from the royalty interest.

Morever,[sic] there was no investment. It would be easy to get confused on this point, particularly since Coastal has spent a great deal of money on this project over the years. However, the 16 million dollars Coastal spent

drilling oil wells from 1947 to 1976 cannot be counted as an investment in the residual royalty because the royalty was not created until 1976. Coastal maintains that it gave up 50% of its leases in 1976, in part as consideration for the royalty, but it would be more accurate to say that Coastal gave up 50% of its leases as consideration for the settlement of the lawsuit which was then pending on appeal. In return Coastal got a gauranteed [sic] that it would retain the other 50%. It is true that Coastal paid rent for the reserved royalty interest from 1976 to 1990. However, Coastal had the right share in the profits, if any, during the period in which rent was paid. The State stopped collecting rent after the 1990 legislation took effect. (Plaintiff's Exhibit 293). Coastal has not shown that it invested money specifically for the purpose of enhancing its opportunity to obtain a profit from the reserved royalty.

All of the six factors listed in the Estuary Properties case favor the State and together they lead the court to conclude that the 1990 legislation did not effect a taking of the reserved royalty interest. Coastal's claim for damages for inverse condemnation must fail on this analysis alone.

III

CONCLUSION

The claim for damages for inverse condemnation must fail for all of reasons given above. Under the circumstances of the case, there can be no implied condition of "utmost fair dealing" that requires the State to lease the property. Therefore, Coastal has no right that could be enforced in an inverse condemnation case. By enacting the 1990 legislation, the State did no more than discharge its duty to hold the sovereign lands in the public trust.

Regulations on the use of those lands cannot be regarded as a taking of property without due process. Finally, the factors that apply in the analysis of an inverse condemnation claim all weigh in favor of the State. Even if the reserved royalty was sufficient to support an action against the State, the failure to lease the land does not amount to a taking of property.

These conclusions are consistent with the applicable law. Beyond that, however, common sense dictates a denial of Coastal's claim for damages based on a claim of inverse condemnation. A ruling that there has been a taking of property would enable Coastal to proceed to a trial on the issue of damages and the net result would be to elevate a speculative claim to profits from an undiscovered and undeveloped oil well into a fairly certain claim for damages, at least in some amount, against the public treasury. A more practical interpretation leads the court to conclude that no property right was taken and that no compensation can be due.

DONE AND ORDERED in Tallahassee, Florida on August 5, 1996.

/s/Philip J. Padovano
PHILIP J. PADOVANO
Circuit Judge

copies to:

Robert J. Angerer, Esq.
John K. Aurell, Esq.
Attorneys for the Plaintiff

Dennis Dean, Esq.
Johnathan Glogau, Esq.
Attorney's for the Defendants

SUPREME COURT OF FLORIDA

WEDNESDAY, JANUARY 28, 1998

CASE NO. 91,956

District Court of Appeal,
1st District - No. 96-3035

COASTAL PETROLEUM COMPANY, etc.,

Petitioner,

v.

LAWTON CHILES, et al.,

Respondents.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, SHAW, HARDING, WELLS and ANSTEAD, JJ., concur

A True Copy

TEST:
Sid J. White
Clerk Supreme Court

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO.: 93-3383

COASTAL PETROLEUM COMPANY,

Appellant,

v.

LAWTON CHILES, GOVERNOR, et al., as and constituting THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, STATE OF FLORIDA; and as constituting THE EXECUTIVE BOARD OF THE DEPARTMENT OF NATURAL RESOURCES, STATE OF FLORIDA,

Appellees.

Opinion filed June 23, 1995.

An appeal from the Circuit Court for Leon County.
L. Ralph Smith, Judge.

Robert J. Angerer, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Denis Dean and Jonathan A. Glogau, Assistant Attorneys General, Parker Thompson, Special Assistant Attorney General, Tallahassee, for Appellees.

Charles W. Pittman and Susan W. Fox of Macfarlane Ferguson, Tampa; John K. Aurell of Macfarlane Ausley Ferguson & McMullen, Tallahassee, for Amici Curiae.

PER CURIAM.

Coastal Petroleum Company seeks reversal of a final summary judgment entered in favor of the State of Florida, the appellee and defendant in Coastal's inverse condemnation suit. Because genuine issues of material fact exist, we reverse the summary judgment. For the same reason, we affirm the lower court's denial of Coastal's motion for partial summary judgment.

Coastal came into possession of certain oil and gas drilling leases on off-shore property some fifty years ago. In 1968, the state challenged the validity of these leases in federal district court, and, while Coastal's interest was preserved by the district court judgment, the parties nevertheless entered into lengthy settlement negotiations. A settlement agreement was eventually obtained, and a consent decree was entered in 1976. Among other things, the settlement agreement provided that Coastal would surrender its interests in certain property entirely while retaining a royalty interest or a leasehold interest in other property. The royalty interest provides a 6.25% interest in the well-head value of certain property for a term of 40 years.

In 1990, the Florida Legislature enacted Chapter 90-72, Laws of Florida (1990), which provides that no structure for the drilling or production of oil or gas could be constructed within certain areas, including properties on which Coastal held a royalty interest. Coastal believes that the enactment of Chapter 90-72 constitutes a taking of its royalty interest and, therefore, filed an inverse

condemnation action seeking compensation for this alleged taking.

As indicated above, the state moved for summary judgment, arguing essentially that, because no lease for drilling had been granted by the state during the 15 years since entry of the settlement and because Coastal had no authority to compel the state to grant a lease for drilling, Coastal's royalty right was such an illusory interest that it could not be subject to a "taking."

The grant of summary judgment in favor of the state obviously involved the weighing and resolution of certain matters and the logical inferences therefrom, such as the expectation of the parties at the time the settlement was entered and the meaning and effect to be given to numerous documents submitted into evidence. Accordingly, summary judgment was improperly granted. Streeter v. Bondurant, 563 So. 2d 729 (Fla. 1st DCA 1990). similarly, we find that a partial summary judgment in favor of Coastal on the question of whether a taking occurred would be premature at this juncture of the case since the facts are far from "crystallized." See, Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985) (a summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law). By this decision, we make no determination as to the merits of any arguments of law relating to the merits of the underlying action.

Accordingly, we REVERSE in part, AFFIRM in part and REMAND for further proceedings.

WEBSTER, MICKLE AND VAN NORTWICK, JJ., CONCUR.

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 90-3195

COASTAL PETROLEUM COMPANY, a Florida Corporation,

Plaintiff,

vs.

HONORABLE LAWTON CHILES, *et al.*, as and constituting the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida; and as and constituting the Executive Board of the Department of Natural Resources of the State of Florida,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This cause came on for hearing on June 15, 1993, on Plaintiff's AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF WHETHER THE LEGISLATURE HAS TAKEN COASTAL'S OIL AND GAS ROYALTY INTEREST and Defendants' MOTION FOR SUMMARY JUDGMENT DIRECTED TO PLAINTIFF'S AMENDED COMPLAINT. The Court having reviewed the pleadings, motions, memoranda, and evidence presented and having heard oral argument, finds and orders the following:

FINDINGS OF FACT

1. In 1941, Coastal's predecessor was granted a series of leases to explore for and produce oil, gas and other minerals in extensive areas of submerged lands held by the State of Florida.[1]

2. A dispute arose in the late 1960's regarding the continuing validity of these leases (licenses). Coastal filed suit against the state and federal governments to compel the issuance of permits for Coastal to mine limestone from the bottoms of Lake Okeechobee. The State counterclaimed that the leases were void. Judgment was entered for Coastal and the Trustees appealed. The Fifth Circuit Court of Appeals certified questions to the Florida Supreme Court and the certification was withdrawn upon settlement of the suit.[2]

3. The ultimate result of the federal lawsuit and appeal was a decision by the parties to settle the matter. This settlement was embodied in a Memorandum of Settlement between the State and Coastal dated January 6, 1976. It is this Memorandum of Settlement which defines

---

[1] These leases have been adjudicated actually to be licenses for Coastal to enter the State's property to explore for oil, gas, and other minerals; the licenses transferred no present ownership or possessory rights to the minerals in place. Coastal v. INC, 709 F.Supp. 1092, 1097 (N.D. Fla. 1988); Coastal v. Sec of Army, 315 F.Supp. 845 (S.D. Fla. 1970).

[2] Coastal v. Sec. of the Army, 315 F.Supp. 845 (S.D. Fla. 1970), *questions certified*, 489 F. 2d 777 (5th Cir. 1973), *rehearing en bancdenied*, 491 F. 2d 973 (5th Cir.), *cert. den.* 419 U.S. 842 (1974), *certification dism.*, 338 So. 2d 841 (Fla 1976), *certification withdrawn and remanded for entry of consent decree*, 536 F. 2d 1030 (5th Cir. 1976), *app. dismissed after remand*, 547 F. 2d 288 (5th Cir. 1977).

the rights of the parties which are the subject of this action.

4. Pursuant to the Memorandum of Settlement, Coastal surrendered a portion of the leases (licenses), agreeing to retain active rights to seek recovery of covered minerals only in the most offshore portion of the original area to which the leases (licenses) pertained. Coastal reduced its interest in the most landward portion to a "residual royalty interest." It is this "residual royalty interest" which is the subject of this suit. The "residual royalty interest" reserved by Coastal in the 1976 Memorandum of Settlement constituted a right to participate in the value of any recovery of oil, gas or other minerals from the area to which the royalty interest applies ("royalty area") should a third party recover any of them.

5. During the 15 year period from 1976 to the Institution of this suit, no one requested and the State granted no leases in the royalty area. The uncontested affidavit of Daniel T. Crabb, filed with Defendants' Memorandum, shows that in the time since the Memorandum of Settlement there have been no requests for a lease in these areas from the Trustees. Coastal's letter of March 17 1992, after the institution of this suit, does not serve to controvert this fact. This letter appears to be merely a self-serving attempt to avoid arguments raised by the Trustees as to interest in leasing the royalty area.

6. On May 8, 1990, the Board of Trustees of the Internal Improvement Trust Fund and the Department of Natural Resources adopted a policy which provides:

> The policy of the Governor and Cabinet, sitting as the head of the Department of Natural Resources

> and as the Board of Trustees of the Internal Improvement Trust Fund, is to prohibit seismic activities using explosives and to prohibit the drilling, exploration, or production of oil and gas resources from structures located in the sovereign waters of the State of Florida, including bays, estuaries, freshwater lakes, rivers and streams.

7. The Legislature of Florida then passed Ch. 90-72, Laws of Florida, which provides, in pertinent part:

> After July 31, 1990, no oil or natural gas lease shall be granted, sold, or executed covering lands located north of 26°00'00" north latitude off Florida's west coast to the western boundary of the State bordering Alabama as set forth in s.1, Art II of the State Constitution[.]

8. This court (Judge Reynolds) concluded that the legislative enactment "trumped the policy" as to the area still covered by Coastal's active drilling rights. The policy and the statute are fully consistent as to the royalty area.

9. It is Plaintiff's claim that the statutory prohibition against leasing in the royalty area renders that interest valueless and therefore it is entitled to compensation in inverse condemnation.

CONCLUSIONS OF LAW

1. Whether the action of the State constitutes a "taking" for which compensation is due is dependent on the type of interest owned by the Plaintiff. Coastal relies upon and analogizes this case to Askew v. Gables-by-the-Sea, 333 So. 2d 56 (Fla. 1st DCA 1976). In Askew, the

Plaintiffs had purchased the fee simple interest in submerged lands from the State (Trustees). This transaction carried with it the reasonable expectation that the State would grant permits necessary for the development of the property. Coastal's reservation of a royalty in its surrender back to the Trustees of portions of its lease creates no such reasonable expectation.

2. Coastal's interest in the royalty area, reserved in the Memorandum of Settlement, is a limited one. Coastal v. IMC, 709 F.Supp. 1092, 1098 n.3 (N.D. Fla. 1988) (Coastal's interest reserved from the licenses is that of a "residual royalty right owner.") If the State in the future leases land in the royalty area and oil, gas, or other minerals are recovered, then Coastal is entitled to 6.25% of the value of those minerals.[3] As Coastal concedes, this passive royalty interest does not give it the right to force the State either to grant a lease or to actively seek oil and gas in the royalty area.[4] Neither does Coastal's residual royalty interest contain any reasonable expectation that the State would grant such a lease should one be requested. This is shown by the fact that no lease was sought from the State from 1976 to 1990 and that the Trustees of the Internal Improvement Trust Fund, who would ultimately

---

[3] In addition, if the State or other governmental body recovers oil or gas for public use, Coastal is entitled to its 6.25%. Recovery of other minerals by the State or other governmental agency for public use does not entitle Coastal to payment of the royalty.

[4] Coastal's reserved royalty interest creates no expectation of future development. Even if a duty to act on the State's part could be implied from Coastal's reservation, all that would be required of the State is that it act as an ordinary, prudent landowner. Welles v. Berry, 434 So. 2d 982 (Fla. 2nd DCA 1983). Under that standard, a landowner can exercise his rights with the same self-interest in mind as if there were no outstanding royalty interest. Id. at 986. Based on its status as trustee of submerged lands, the State has fulfilled this requirement.

pass on any application, adopted the Policy in 1990.

3. If the State had not adopted Ch. 90-72, Laws of Florida, but merely refused, on a case-by-case basis, to issue any new leases, then in the year 2016 when the "residual royalty interest" expires, Coastal would have no claim against the State. Coastal having conceded that the State is under no duty to lease rights to extract minerals from the property to which this "residual royalty interest" applies, the manner of declining to grant such leases, whether on a case-by-case basis, or generally, is legally immaterial.

4. In 1970, six years prior to the execution of the Memorandum of Settlement, the people of Florida adopted Art. X, § 11, Fla. Const., which provides:

> Title to lands under navigable waters, within the boundaries of the State, which have not been alienated . . . is held by the state, by virtue of its sovereignty, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest.

This provision is "largely a constitutional codification of the public trust doctrine contained in [Florida] case law" Coastal v. American Cyanamid, 492 So. 2d 339, 344 (Fla. 1986). The public trust doctrine has been part of Florida law since 1893 when the Florida Supreme Court adopted the U.S. Supreme Court's formulation of the doctrine. State v. Black River Phosphate, 13 So. 640, 645-47 (Fla. 1893) (quoting Illinois Central R.R. Co. v. Illinois, 146 U.S. 387, 451-52 (1892).

5. In that the leases have been determined to be

licenses under which no possessory interest in minerals vests unless and until extracted and would then only apply to those minerals actually extracted, there has been no alienation of the title to Coastal in the areas to which the residual royalty interest attaches prior to the adoption of Art. X, § 11, Fla. Const., in 1970.

6. At the time of the execution of the Memorandum of Settlement, Coastal returned its interest in the royalty area to the State, reserving only the "residual royalty interest." The land to which the "residual royalty interest" attaches remained subject to the public trust doctrine and, therefore, a decision by the State to lease that property or convey any interest therein would necessarily be limited by this doctrine. In order for a lease to be granted, the Trustees would have to determine that it is in the public interest. Against this background, Coastal's reservation of the subject royalty interest not only did not create a duty on the part of the State to lease, but lacked any reasonable expectation that the State would lease in the future.

7. By enacting Ch. 90-72, Laws of Florida, the Florida Legislature was merely exercising its constitutional authority to protect the lands held in trust for all the public Because of Coastal's lack of expectation that the State would lease and lack of ability to force the State to lease, the State's action protecting its sovereignty submerged lands by preventing leasing and drilling does not constitute a compensable taking of Coastal's reserved royalty interest.

ORDER

Based on the foregoing, it is ORDERED and ADJUDGED that:

1. The Plaintiffs Motion for partial summary judgment is DENIED;

2. Defendants Motion for Summary Judgment is GRANTED.

3. This case is hereby DISMISSED with prejudice, and Plaintiff shall go hence without day.

DONE and ORDERED in chambers in Tallahassee, Florida, this 9th day of September, 1993.

/s/L. Ralph Smith
CIRCUIT JUDGE

Copies furnished to:

Denis Dean
Jonathan A. Glogau
Assistant Attorneys General
The Capitol, PL-01
Tallahassee, FL 32399-1050

Parker D. Thomson
Special Assistant Attorney General
1700 Ameri First Building
Miami, FL 33131

Robert J. Angerer
P.O. Box 10468
Tallahassee, FL 32302

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF
FLORIDA, MIAMI DIVISION

NO. 68-951-CA and
69-699-Div.-CA (consolidated)

COASTAL PETROLEUM COMPANY.
a Florida corporation,

Petitioner,

v.

SECRETARY OF THE ARMY OF THE UNITED
STATES OF AMERICA, et al.,

Respondent.

MEMORANDUM OF SETTLEMENT

THIS MEMORANDUM OF SETTLEMENT is made this 6th day of January, 1976, by and between the BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA, hereinafter called the "Trustees," and COASTAL PETROLEUM COMPANY, a corporation organized under the laws of Florida, hereinafter called "Coastal."

WHEREAS, the Trustees and Coastal entered into modifications of Florida State Drilling Leases 224-A, 224-B and 248 the 27th day of February, 1947. The location of

the areas contained within Drilling Leases 224-A and 224-B consist primarily or Florida's offshore lands approximately from Naples to Apalachicola in the Gulf of Mexico extending 10.36 statute miles from Florida's coastline, including all bays, inlets and rivers flowing into the Gulf in this area. The drilling area contained within Lease 248 consists of approximately two drilling blocks consisting of all the water bottoms lying within the boundaries to Lake Okeechobee and all the water bottoms lying within the boundaries of the following lakes:

Istokpoga	Hatchineha
Kissimmee	Louisa
Apopka (part)	Panasoffkee
George	Tsala Apopka
Lochloosa	St. Johns River

The Leases require annual rental payments and mandatory drilling requirements.

WHEREAS, certain questions have been raised involving the legality of said Leases and the validity of certain waivers or credits granted by Trustees, to wit: whether Coastal has complied with the drilling requirements of the Leases, and whether the Trustees can grant waivers of those drilling requirements, and, as a result, litigation was commenced in the United States District Court in and for the Southern District of Florida, by Coastal seeking a declaration inter alia as to the validity of said Leases. On April 23, 1971, a Final Judgment was entered declaring inter alia the above Leases to be valid and existing. The Trustees then took an appeal to the United States Court of Appeals, for the Fifth Circuit, from said Judgment, and said appeal is now pending in the Florida Supreme Court as a result of a certification by the Fifth Circuit; and

WHEREAS, the Trustees and Coastal now desire to enter into various amendments and changes of the aforesaid Leases in such manner as amicably to clarify the rights and responsibilities of the parties thereto, and to settle, adjust and resolve the differences between them; and

WHEREAS, the Trustees have independently determined that said amendments, changes and clarification will be in the best interest of the State of Florida.

NOW, THEREFORE, the Trustees and Coastal do covenant and agree as follows:

SECTION ONE

PURPOSE

The purpose of this agreement is a compromise between the parties for the complete and final settlement of their claims, differences and causes of action with respect to the dispute described below.

SECTION TWO

STATEMENT OF DISPUTE

The Trustees assert that a final judgment should be entered declaring Florida State Drilling Lease 224-A, as modified; Florida State Drilling Lease 224-B, as modified, and Florida State Drilling Lease 248, as modified, hereinafter referred to as The Leases, each of which leases is between the Trustees and Coastal and dated February 27, 1947, invalid and void. An appeal has been filed in the United States Fifth Circuit Court of Appeals by the Trustees in the case styled

Coastal Petroleum Company, a Florida Corporation, Petitioner-Appellee, vs. Secretary of the Army of the United States of America, et al., No.712589, asserting such claim.

Coastal denies the invalidity and/or voidness of the said leases and asks and asserts that the appeal should be denied.

The parties desire to reach a full and final compromise and settlement of all matters and all causes of action arising out of the facts and claims as set forth above.

SECTION THREE

GENERAL TERMS OF SETTLEMENT

In consideration of the mutual covenants set forth herein, the parties agree as follows:

1. (A) Coastal agrees to reduce and surrender acreage and/or economic interests in the said leases.

(B) Coastal agrees to have rental obligations of the said leases continue on areas as to which it retains any interest.

(C) Coastal agrees to reduce its interest and have the areas in which it retains any residual royalty interest released completely to the Trustees at the end of 40 years from the date hereof. Coastal agrees to have the areas in which it retains any right to explore and develop oil, gas and other minerals released completely to the Trustees within 40 years from the date hereof except that any operations producing oil, gas, or other minerals in economically sustainable quantities at the end of such 40 years shall be

permitted to continue subject to the particular lease until such operations cease.

(D) Coastal shall have no right to intervene in any land use decisions within the areas leased other than as to the outermost three miles retained by Coastal. Coastal's only rights as to areas other than the outer three miles and Lake Okeechobee shall be the specified residual royalty on oil, gas, and other minerals. The term "minerals," a used herein, shall not include - among other things - sand gravel or unconsolidated seashells. Any use of minerals other than oil or gas for a public purpose by the Trustees or any government body so authorized by the Trustees may be made without Coastal's approval and without payment of any compensation or royalties to Coastal.

2. (A) The parties agree that all claims, demands, rights and causes of action that they have against each other with respect to the above-described dispute are satisfied, discharged, and settled.

(B) The Trustees agree to terminate the pending appeal and both parties agree to seek a consent decree based upon the terms hereof, but the failure to obtain a consent decree shall not invalidate the effectiveness of this settlement agreement.

(C) The parties agree that the first sentence of the first paragraph of Article 13 of each of said leases shall be amended to read as follows:

> "The rights of either party hereunder may be assigned in whole or in part only after written consent thereto from the Trustees is first obtained, which consent shall not be unrea-

sonably withheld, and the provision a hereof shall extend to the successors and assigns of the parties hereto, but no change or division in ownership of land rentals or royalties, however accomplished, shall operate to enlarge or diminish the obligations or the rights of either party."

(D) The Trustees agree that drilling obligations under Leases 224-A, 224-B and 248 (as modified) shall be governed by Chapter 20680, Laws of Florida, Acts of 1941, and that all further drilling requirements are hereby waived.

(E) In enforcing its residual royalty rights in any leased lands, Coastal shall not enter suit against third parties without first notifying the Trustees and offering the Trustees the opportunity to participate in such action. Should the Trustees decline to participate and should Coastal nevertheless pursue litigation that results in a monetary recovery which benefits the Trustees, the Trustees then shall share, pro rata, in the payment of reasonable attorneys fees and court costs, but in no event shall the Trustees be obligated for any fees and costs in excess of their monetary recovery from such litigation.

SECTION FOUR

SPECIFIC PROVISIONS OF SURRENDER AND RELEASE

1. Coastal hereby surrenders and releases to the Trustees, pursuant to Article 16 contained in each of said leases, an area three statute miles wide beginning three statute miles landward from the three league Federal-State boundary and extending the full length of leases 224-A and 224-B.

2. Coastal hereby reduces its interest in all other areas landward of the three statute miles surrendered and released to the Trustees, and including all inland areas except Lake Okeechobee. In these areas, Coastal shall retain only a residual royalty of 6 1/4% on the wellhead value of oil and gas, payable in cash or in kind at the option of Coastal; 25 cents per long ton on sulphur; and 5% of production or of the market value of other minerals, and shall have no other rights whatever except those of a residual royalty right owner.

3. The Trustees simultaneously hereby waive their right to any royalties from Coastal under the terms of leases 224-A, 224-B and 248 from areas described in Paragraph 2 above, and retain full royalty in all other areas subject to said leases.

4. Coastal, recognizing that Lake Okeechobee presents special problems for preservation of its integrity as a fresh water reservoir vital to southern Florida, agrees that no exploration or development drilling or mining of any kind whatsoever shall be conducted thereon without the prior approval of the Trustees.

5. The current annual rental on Leases 224-A and 224-B now totals $49,614.40. The new annual rental on Leases 224-A and 224-B shall be $39,261, reflecting the reduction of lands leased. The annual rental requirement on Lease 243 shall remain the same, to-wit: $19,985.92.

6. Coastal shall secure permits from all appropriate State environmental protection agencies in compliance with the then existing laws and regulations, prior to any drilling or mining.

In all other respects, other than the amendments related herein, the provisions of the leases remain in full force and effect.

IN WITNESS WHEREOF, the BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OP THE STATE OF FLORIDA, the Lessor, have hereunto subscribed their names and have caused the seal of the State of Florida to be hereunto affixed, and COASTAL PETROLEUM COMPANY, the Lessee, has caused this instrument to be executed in its name by its President, and its corporate seal to be affixed, attested by its Assistant Secretary, as of the date aforesaid.

/s/ Reubin O'D Askew
Governor

/s/ Bruce A. Smathers
Secretary of State

/s/ Robert L. Shevin
Attorney General

/s/ Gerald A. Lewis
Comptroller

/s/ Philip F. Ashler
State Treasurer

/s/ Doyle Conner
Commissioner of Agriculture

/s/ Ralph D. Turlington
Commissioner of Education

ACTING AND COMPOSING THE BOARD
OF TRUSTEES OF THE INTERNAL
IMPROVEMENT TRUST FUND OF THE
STATE OF FLORIDA

LESSOR

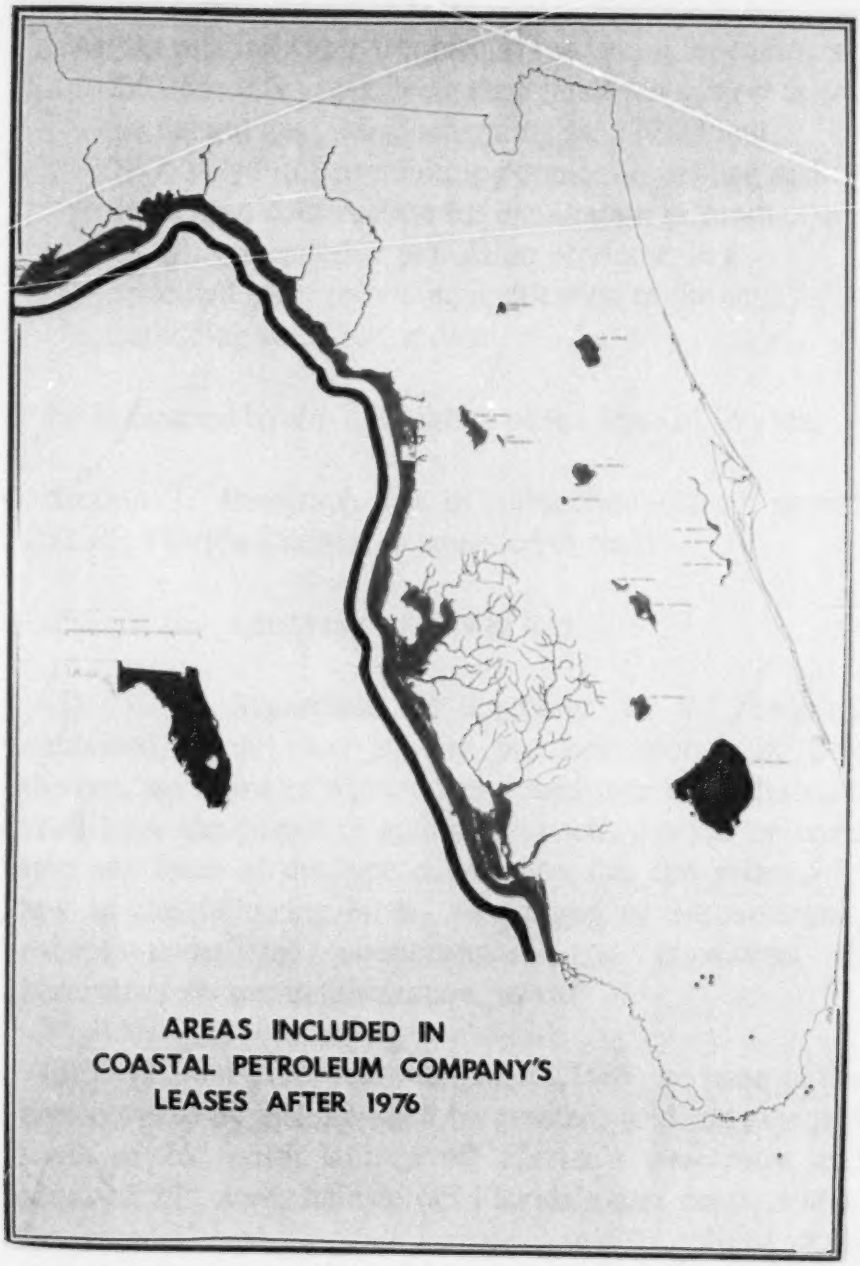
COASTAL PETROLEUM COMPANY
By /s/Benjamin W. Heath
President

LESSEE

ATTEST:
/s/ Harmon W. Shields
Executive Director
DEPARTMENT OF NATURAL RESOURCES

ATTEST:
/s/ C. Dean Reasoner
Assistant Secretary

Approved as to form and legal sufficiency.
ROBERT L. SHEVIN
ATTORNEY GENERAL
By: /s/ J. Kendrick Tucker
Assistant Attorney General


AREAS INCLUDED IN
COASTAL PETROLEUM COMPANY'S
LEASES AFTER 1976

CHAPTER 90-72

Senate Bill No. 1642

An act relating to environmental resources; amending s. 253.61, F.S.; specifying state lands not subject to oil or natural gas leases; amending ss. 377.24 and 377.242, F.S.; prohibiting permits for drilling and associated construction for exploration or production of oil, gas, or other petroleum products, in a specified area; providing application of the act; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (d) of subsection (1) of section 253.61, Florida Statutes, is amended to read:

253.61 Lands not subject to lease.-

(1) Regardless of anything to the contrary contained in this law in any previous section or part thereof, no board or agency mentioned therein or the state shall have the power or authority to sell, execute or enter into any lease of the type covered by this law relating to any of the following lands, submerged or unsubmerged, except under the circumstances and conditions as hereinafter set out in this section, to wit:

(d) Without exception, after July 1,1989, no lease of the type covered by this law shall be granted, sold, or executed south of 26° north latitude off Florida's west coast and south of 27° north latitude off Florida's east coast, within the boundaries of Florida's territorial seas as defined in 43 U.S.C. 1301, ~~subsection (6)~~. After July 31,1990, no oil or

natural gas lease shall be granted, sold, or executed covering lands located north of 26°00'00" north latitude off Florida's west coast to the western boundary of the state bordering Alabama as set forth in s.1, Art. II of the State Constitution, or located north of 27°00'00" north latitude off Florida's east coast to the northern boundary of the state bordering Georgia as set forth in s. 1, Art. II of the State Constitution, within the boundaries of Florida's territorial seas as defined in 43 U.S.C. 1301.

Section 2. Subsection (9) of section 377.24, Florida Statutes, is amended to read:

377.24 Notice of intention to drill well; permits; abandoned wells and dry holes.-

(9) Without exception, after July 1, 1989, no permit to drill a well in search of oil or gas shall be granted south of 26°00'00" north latitude off Florida's west coast and south of 27°00'00" north latitude off Florida's east coast, within the boundaries of Florida's territorial seas as defined in 43 U.S.C. 1301, ~~subsection (6)~~. After July 31, 1990, no permit to drill a well in search of oil or gas shall be granted north of 26°00'00" north latitude off Florida's west coast to the western boundary of the state bordering Alabama as set forth in s. 1, Art. II of the State Constitution, or located north of 27°00'00" north latitude off Florida's east coast to the northern boundary of the state bordering Georgia as set forth in s. 1, Art. II of the State Constitution, within the boundaries of Florida's territorial seas as defined in 43 U.S.C. 1301.

Section 3. Paragraph (a) of subsection (1) of section 377.242, Florida Statutes, is amended to read:

377.242 Permits for drilling or exploring and extracting through well holes or by other means. -- The department is vested with the power and authority:

(1)(a) To issue permits for the drilling for, exploring for, or production of oil, gas, or other petroleum products which are to be extracted from below the surface of the land, including submerged land, only through the well hole drilled for oil, gas, and other petroleum products.

1. No structure intended for the drilling for, or production of, oil, gas, or other petroleum products may be permitted or constructed on any submerged land within any bay or estuary.

2. No structure intended for the drilling for, or production of, oil, gas, or other petroleum products may be permitted or constructed within 1 mile seaward of the coastline of the state.

3. No structure intended for the drilling for, or production of, oil, gas, or other petroleum products may be permitted or constructed within 1 mile of the seaward boundary of any state, local, or federal park or aquatic or wildlife preserve or on the surface of a freshwater lake, river, or stream.

4. No structure intended for the drilling for, or production of, oil, gas, or other petroleum products may be permitted or constructed within 1 mile inland from the shoreline of the Gulf of Mexico, the Atlantic Ocean, or any bay or estuary or within 1 mile of any freshwater lake, river, or stream unless the department is satisfied that the natural resources of such bodies of water and shore areas of the state will be adequately protected in the event of accident or blowout.

5. Without exception, after July 1,1989, no structure intended for the drilling for, or production of, oil, gas, or other petroleum products may he permitted or constructed

south of 26°00'00" north latitude off Florida's west coast and south of 27°00'00" north latitude off Florida's east coast, within the boundaries of Florida's territorial seas as defined in 43 U.S.C. 1301, ~~subsection (6)~~. After July 31, 1990, no structure intended for the drilling for, or production of, oil, gas, or other petroleum products may be permitted or constructed north of 26°00'00" north latitude off Florida's west coast to the western boundary of the state bordering Alabama as set forth in s.1, Art. II of the State Constitution, or located north of 27°00'00" north latitude off Florida's east coast to the northern boundary of the state bordering Georgia as set forth in s. 1, Art. II of the State Constitution, within the boundaries of Florida's territorial seas as defined in 43 U.S.C. 1301

Each permit shall contain an agreement by the permitholder that the permitholder will not prevent inspection by division personnel at any time.

Section 4. This act does not apply to any lease entered into before the effective date of this act.

Section 5. This act shall take effect August 1, 1990.
Approved by the Governor June 12, 1990.

Filed in Office Secretary of State June 12,1990.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

253.52 Placing oil and gas leases on market by board. - Whenever in the opinion of the Board of Trustees of the Internal Improvement Trust Fund there shall be a demand for the purchase of oil and gas leases on any area, tract, or parcel of the land so owned, controlled, or managed, by any state board, department, or agency, then the board shall place such oil and gas lease or leases on the market in such blocks, tracts, or parcels as it may designate. The lease or leases shall only be made after notice by publication thereof has been made not less than once a week for 4 consecutive weeks in a newspaper of general circulation published in Leon County, and in a similar newspaper for a similar period of time published in the vicinity of the lands offered to be leased, the last publication in both newspapers to be not less than 5 days in advance of the sale date. Such notice shall be to the effect that a lease or leases will be offered for sale at such date and time as may be named in said notice and shall describe the land upon which such lease, or leases, will be offered. This notice may be combined with the notice required pursuant to s. 253.115. Before any lease of any block, tract, or parcel of land, submerged, or unsubmerged, within a radius of 3 miles of the boundaries of any incorporated city, or town, or within such radius of any bathing beach, or beaches, outside thereof, such board, department, or agency, shall through one or more of its members hold a public hearing, after notice thereof by publication once in a newspaper of general circulation published at least 1 week prior to said hearing in the vicinity of the land, or lands, offered to be leased, of the offer to lease the same, calling upon all interested persons to attend said hearing where they would be given the opportunity to be heard, all of which shall be considered by the board prior to the execution of any lease or leases to said land, and the board may withdraw said land, or any part thereof, from the

market, and refuse to execute such lease or leases if after such hearing, or otherwise, it considers such execution contrary to the public welfare. Before advertising any land for lease the form of the lease or leases to be offered for sale, not inconsistent with law, or the provisions of this section, shall be prescribed by the board and a copy, or copies, thereof, shall be avail able to the general public at the office of the Board of Trustees of the Internal Improvement Trust Fund and the advertisements of such sale shall so state.

History. - s. 2, ch 22824, 1945; s. 1, ch 24339, 1947; s. 11, ch. 25035, 1949; s. 10, ch 26484, 1951; ss. 27, 35, ch. 69-106; s. 3, ch. 69-369; s. 493, ch. 94-356.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

Case No. 96-4222, Case No. 96-5038,
Case No. 97-4362, Case No. 97-4591

FLORIDA WILDLIFE FEDERATION, INC.;
SIERRA CLUB, FLORIDA CHAPTER; and
FLORIDA AUDUBON SOCIETY, INC.,

Petitioners,

and

ROBERT A. BUTTERWORTH, ATTORNEY
GENERAL,

Intervenor,

vs.

DEPARTMENT OF ENVIRONMENTAL
PROTECTION and COASTAL PETROLEUM
COMPANY,

Respondents.

ST. GEORGE ISLAND CIVIC CLUB,

Petitioner,

and

ROBERT A. BUTTERWORTH,
ATTORNEY GENERAL,

Intervenor,

vs.

DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondent.

COASTAL PETROLEUM COMPANY,

Petitioner,

vs.

ADMINISTRATION COMMISSION,

Respondent.

COASTAL PETROLEUM COMPANY,

Petitioner,

vs.

ADMINISTRATION COMMISSION,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge, Mary Clark, held a formal hearing in the above-styled consolidated cases beginning on October 20, 1997, and continuing until completed on November 6, 1997. The hearing was held in Tallahassee, Florida, with the exception of the public hearing on October 29, 1997, in Apalachicola, Florida.

APPEARANCES

For Environmental Petitioners:

David Guest, Esquire
S. Ansley Samson, Esquire
Earthjustice Legal Defense Fund
Post Office Box 1329
Tallahassee, Florida 32302-1329

For St. George Island Civic Club:

Barbara Sanders, Esquire
St. George Island Civic Club
Post Office Box 157
Apalachicola, Florida 32320-0157

For Department of Environmental Protection:

Andrew J. Baumann, Esquire
John W. Costigan, Esquire
Tony Ettore, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard

Tallahassee, Florida 32399-3000

For Administration Commission:

Michael Takac, Esquire
Room 209, The Capitol
Tallahassee, Florida 32399-0001

For Attorney General of Florida:

Denis Dean, Esquire
Monica Reimer, Esquire
Department of Legal Affairs
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

For Coastal Petroleum Company:

Robert J. Angerer, Sr., Esquire
Robert J. Angerer, Jr., Esquire
Post Office Box 10468
Tallahassee, Florida 32302-0468

STATEMENT OF THE ISSUES

The issues in these consolidated cases are whether Coastal Petroleum Company is entitled to an oil and gas exploration permit (Permit no. 1281) and, if so, what conditions should attach, including a reasonable surety amount.

PRELIMINARY STATEMENT

On August 16, 1996, the Department of Environmental (DEP) notified Coastal Petroleum Company

(Coastal) of its intent to issue Permit no. 1281. On August 30, 1996, Florida Wildlife Federation, Inc., Sierra Club, Florida Chapter, and Florida Audubon Society, Inc. (Environmental Petitioners), filed a verified petition for formal administrative hearing pursuant to Section 403.412(5), Florida Statutes, disputing the intended permit.

Petitions in opposition to the permit were also filed by the St. George Island Civic Club and by the St. George Island Plantation Owners' Association, Inc. When the petitions were forwarded to the Division of Administrative Hearings (DOAH) for conduct of a formal evidentiary hearing, the cases were assigned numbers 96-4222, 96-5038 and 96-5047, respectively, and were consolidated. Later, the St. George Island Plantation Owners' Association, Inc., voluntarily withdrew its petition and the file in Case No. 96-5047 was closed.

In the meantime, Coastal filed a Petition for Review of Nonfinal Agency Action (Case No. 96-3226) and an alternative Notice of Appeal (Case No. 96-3227) in the First District Court of Appeal asserting that it was entitled to a permit from DEP without further administrative proceedings and without a requirement that Coastal publish notice of the proposed permit.

Over the objection of the Environmental Petitioners, the Administrative Law Judge granted Coastal's request for stay of the administrative proceedings pending disposition of the appellate issues (order entered October 3, 1996). In a letter dated March 17, 1997, counsel for Coastal informed the Administrative Law Judge that its Writ of Certiorari and Motion for Clarification had been denied and that Coastal would publish notice of DEP's Intent to Issue on March 20, 1997.

No additional parties filed petitions in response to the published notice and in an order entered April 30, 1997, the Administrative Law Judge set the formal hearing to commence on September 29, 1997.

A Petition to Intervene by Attorney General Robert A. Butterworth was granted on July 30, 1997, without objection.

The hearing was continued until October 20, 1997, after DEP and the Governor and Cabinet acting as the Administration Commission applied newly-enacted Chapter 97-49, Laws of Florida (codified as Section 377.2425(1)(c), Florida Statutes) and required as a condition of Permit No. 1281 that Coastal provide surety of $4,249,637,886. In response to the surety action Coastal filed two petitions for formal hearing, one directed to the Administration Commission (referred to DOAH and assigned Case No. 97-4362) and the other directed to DEP, which had calculated and recommended the surety amount (referred to DOAH and assigned Case No. 97-4591). These petitions were consolidated with the pending cases and all four proceeded to hearing as described above.

The parties filed their prehearing stipulation on October 16, 1997. At the commencement of the hearing the Environmental Petitioners were permitted to amend their petition to clarify some issues, to delete others, and to add a request for attorney's fees.

At the hearing Coastal presented the following witnesses:

Phillip W. Ware, president of Coastal, a professional geologist and an expert in petroleum

exploration; Ed Garrett, the DEP employee and professional geologist who processes applications for drilling permits; Anthony Randazzo, Ph.D., an expert in geology and educational geology; Ed Shell, an expert in design and implementation of drilling, casing and cementing programs; Jim Rushing, an expert in offshore environmental considerations of drilling fluids; Tom Herbert, Ph.D., an expert in environmental planning, operation and response, and a professional geologist; Lawrence David Curry, the DEP oil and gas section administrator who reviews applications for drilling permits and is a professional geologist; William Sackett, Ph.D., an expert in marine geochemistry, with emphasis in oil in the sea, inputs and fates; Harry Roberts, Ph.D., an expert in oil and gas seeps and vents in the sea; Charles Wilson, Ph.D., an expert in fisheries and oil and gas platforms; Nick Stratus, Ph.D., the DEP economist who calculated the surety amount; John Supan, Ph.D., an expert biologist with emphasis on oysters; Irving Mendelssohn, Ph.D., an expert in coastal plant ecology, with extensive experience in coastal marshes related to oil spills and cleanup of oil spills; Shea Penland, Ph.D., an expert in coastal geomorphology, marine science, and the effects and cleanup methods of oil spills on coastal habitats of the Gulf of Mexico; Kenneth Shaw Thompson, an expert in cleanup of oil spills; Dagmar Etkin, Ph.D., an expert in oil spill information, analysis and statistics; William H. Colona, a professional geologist and representative of Woodward Clyde Consultants, an environmental consulting firm; Philip Sorensen, Ph.D., an expert in oil and gas economics, viability of rates of return and economic

consequences of oil spills; Theodore Bourgoyne, Jr., Ph.D., an expert petroleum engineer with extensive experience in well control and historic well control events; Deborah French, Ph.D., an expert in oil spill trajectory modeling and oil spill events; Jacqueline Michel, Ph.D., an expert in oil spill response, specifically determining the resources at risk, developing protection priorities, and shoreline cleanup decision-making; Bruce D. Graham, an expert in preparation of photodocumentation surveys, visual analysis and quality control of data collection and photodocumentation; Janet Voorhees, an expert in the area of information on oil and planning; Mike NeSmith, a vice president of Noble Drilling, the contractor who plans to drill the well and an expert in offshore drilling; Clay Durham, Ph.D., an expert in petroleum exploration education and petroleum exploration; Jamil Azad, an expert in petroleum exploration and geophysics; Charles Morrison, an expert in seismic interpretation, geophysics and the Smackover formation; Barry Faulkner, an expert in petroleum exploration geology, generation and evaluation of oil and gas prospects, and in estimating the geologic risks and reserves of a prospect; Al Shannon, an expert in oil and gas field development planning and estimating the costs of such development; George C. Hite, an expert petroleum engineer, with experience in field development planning, cost and viability of prospects; Samuel O. Sugiyama, Ph.D., an expert in risk assessment; and by deposition on rebuttal, Doug Smith, Ph.D., an expert in geophysics and the basement structure of Florida.

The Environmental Petitioners and Attorney General presented the following:

James Thompson, an expert geophysicist with expertise in interpreting seismic lines and identifying petroleum and hydrocarbon bearing structures; Mike Cheeseman, an expert in evaluating oil prospects and an oil exploration geologist; and Murphy Ellen Chandler, a paralegal with experience in title searching.

The DEP presented the following witnesses:

William Gambrell, a DEP employee who is an expert in the area of flow rates from oil wells; Ernie Barnett, a DEP employee who is an expert in natural resource damage assessments; George Henderson, a DEP employee who is an expert in marine biology, Florida marine habitats and resources, and impacts of hydrocarbon releases on same; and Walter Schmidt, Ph.D., the chief of the Florida Geological Survey, the State Geologist, and an expert in geology, Florida geology, Florida stratigraphy and petroleum geology.

The St. George Island Civic Club witnesses testified at the public hearing conducted in Apalachicola, Florida.

The Administration Commission did not present evidence.

The following exhibits were received in evidence: Coastal's Exhibits no. 2, 3, 7-9, 12, 14, 16, 17, 20, 22-25, 30, 32-34, 36, 37, 39, 42-46, 48, 49, 51, 55, 56, 58-76, 84, 87-96, 99, 101, 105, 108, 113, 115-119, 123, 131-134,

140, 141, 143, 145(a) and (b), 147, 149, 151, 153, 155, 157, 159, 161, 163, 164, 167, 169, 171, 174, 176, 180, 182, 185, 186, 189, 193, 195, 197, 199-201, 204, 205, 206, 208, 211, 214, 215, 227, 228, 230-233, 238, 241, 242, 244, 248, 254, 255, 257, 259, 264-267, 271, 273-281, 283, 284, 295, 296, 299-303, 306, 319, 334, 335, 355-359, 361-379, 383, 384, 388, 391, 392, 394, 395, 400-405, 407, 408, 416, 426, 434, 444-459, 462, 465, 470-472, 474(1-g), 475(a-c), 480-483, 494, 495, 503-505, 509, 513, 514, 517-524, 527, 528, 531-537, 539-583, 585, 594-597, 604, and 606; DEP Exhibits no. 1, 1-14, 16-32, 34, 35, 37, 40, 46, 47, 49, 51, 52, 57-59, and 61; Environmental Petitioners' Exhibits no. 7, 10, 12, 13, 15, 16, 21, 29, 30(a-q), 35, 78-83, 85, 117, 128, 131, 135-138, 140-142, 146, 152-154, and 156, and Attorney General's Exhibits no. 1, 3, 6, and 26.[1]

By stipulation executed on October 1, 1992, the parties agreed that certain proprietary geophysical data (primarily seismic profiles covered by a license agreement between Coastal and Western Geophysical) would be presented at hearing as demonstrative exhibits and would be returned to Coastal. One exhibit, Environmental Petitioners' no. 142A, is part of the record in this proceeding, but is confidential and sealed pursuant to Section 377.2409(1), Florida Statutes.

The 26-volume transcript of hearing was filed on January 29 and 30, 1998; the parties' proposed recommended orders, briefs and written argument were filed on March 2 and 3, 1998.

Because there are two agencies with final order authority in this proceeding, DEP (as to permit applications) and the Administration Commission (as to

amount of surety), this recommended order is submitted to both agencies. The record (transcript and exhibits) is being forwarded to DEP.

FINDINGS OF FACT

Parties

1. The applicant Coastal Petroleum Company, (Coastal) is an oil and gas company originally named Arnold Oil Exploration Company, formed in 1941 as a Florida corporation. Its majority owner is Coastal Caribbean Oils and Minerals, Ltd., a company publicly traded on the Boston Stock Exchange. Phillip Ware is president of Coastal, having been elected to that position in 1985.

2. The Department of Environmental Protection (DEP) is the agency of the state responsible for implementing laws and regulations governing oil and gas permits. DEP was created pursuant to Section 20.255, Florida Statutes, as the successor agency to the Florida Department of Environmental Regulation and Department of Natural Resources.

3. The Environmental Petitioners are the Florida Wildlife Federation, Inc., Sierra Club, Florida Chapter, and Florida Audubon Society, Inc. Florida Wildlife Federation and Florida Audubon Society are non-profit Florida corporations and citizens of the state.

4. The St. George Island Civic Club is an organization formed by and on behalf of property owners and residents of St. George Island, Franklin County, Florida.

5. The Administration Commission is a collegial body composed of the Governor and Cabinet of the State of Florida, pursuant to Section 14.202, Florida Statutes.

6. The Attorney General of the State of Florida has intervened in this proceeding pursuant to Section 403.412(5), Florida Statutes.

7. The Attorney General, Environmental Petitioners and St. George Island Civic Club oppose the grant of Permit no. 1281 to Coastal and support a surety requirement in at least the amount established by the Administration Commission on the recommendation by DEP. (DOAH Cases Nos. 96-4222 and 96-5038.) Coastal supports the intended grant of its permit except for certain conditions which it claims are without authority; Coastal opposes the surety recommended by DEP and set by the Administration Commission. (DOAH Cases Nos. 97-4362 and 97-4591.)

The Project

8. The activity that is the subject of the application at issue (Permit no. 1281) is Coastal's drilling of a single exploratory oil and gas well in the Gulf of Mexico within waters of the State of Florida, approximately nine miles south of St. George Island in Franklin County.

9. The target of the exploration is an anticipated structural oil trap within the Jurassic Smackover and Norphlet geological formations. These are the same formations which provide commercially-viable oil production in the Jay field in northwest Florida. The anticipated well depth is 13,000 to 15,600 feet but the

permit would allow drilling to the basement or 18,000 feet, whichever occurs first.

10. Coastal's drilling contractor, Noble Drilling Company, has drilled wells all over the world since 1925. It has been responsible for approximately 10 percent of all the wells drilled in the Gulf of Mexico, or about 190 wells a year, for both major and small independent oil companies.

11. If permitted, Noble will install a portable drilling rig, the Paul Wolff, or similar sister rig, with three columns and footing that will sit on the relatively featureless sea bottom at Coastal's offshore site. The rig will be staffed by a trained Noble crew and will be operated in a zero-discharge mode. That means nothing will be allowed to escape from the rig into the water, including drill cuttings, sewage treatment water, garbage or rain water. Surrounding the rig will be a high seas oil fence with locks, a cleanup crew and vessel, and an evacuation vessel.

12. When drilling is completed, the rig will be removed and the well either abandoned or transferred to production mode with a production platform. With the exception of a 90-day test period covered by the initial drilling permit, all production-related activity must be permitted under a separate application which is not the subject of this proceeding.

The Application Process

13. On March 16, 1992, Coastal submitted 5 offshore drilling applications to the DEP, Bureau of Geology. Assigned numbers 1277-1281, two proposed sites

were offshore of Franklin County, and three were offshore of southwest Florida. Later, applications 1277-1280 were withdrawn and only Permit no. 1281 proceeded through review to a Notice of Intent to Issue.

14. As required, Coastal submitted DEP's one-page Form 3 and included a location plat and filing fee. The application form is only for drilling an exploratory well and not for any oil or gas production.

15. The application's number "1281" denotes that 1280 drilling applications have preceded it since the 1940's when DEP's predecessor agency began formal review. Not all of these proceeded through complete review; many were withdrawn, but most were approved.

16. Coastal's was not a routine application. Since the 1940's, leases and activities related to offshore oil and gas exploration in Florida have been the subject of continuous legal disputes. Most applications are for on-shore drilling and DEP's regulations and review process are more relevant to those land- based operations. The review of Coastal's application therefore, by DEP staff, Ed Garrett, and others, was a commonsense extrapolation from their checklist and other sources reasonably, but not directly, related to the application at hand, for example, federal rules governing outer continental shelf (OCS) drilling.

17. On April 8, 1992, Ed Garrett detailed in a letter to Phillip Ware the following information needed to complete the application:

a) A professional ecological/biological survey and report and photodocumentation of the proposed drill site to permit staff review of the bottom areas and potential impact

on natural resources;

b) An assessment of ambient conditions in the vicinity of the well site, including potential impacts on coastal habitats, air quality, endangered and threatened species, marine mammals, birds, commercial fishing, recreational resources and archeological resources;

c) A zero discharge policy for offshore drilling consistent with the policy established in 1982 when the DEP issued a drilling permit to Getty Oil for drilling in East Bay;

d) An oil spill response plan for recapture of escaped pollutants;

e) A description of the offshore drilling rig to be used;

f) A hurricane response plan, also an item related to the prior Getty drilling permit;

g) A surety in the amount of $15,000,000, to be recommended by staff to the Governor and Cabinet (a sum of $50,000,000 for all 5 wells was also addressed);

h) Description of how the rig design will account for potential Karst collapse;

i) Description of helicopter activity associated with field operations;

j) Description of support locations and facilities to be used with the drill site, including proposed plan for transport of crude oil;

k) a casing program;

l) A cementing program;

m) List of proposed drilling muds and their chemical components;

n) A hydrogen sulfide contingency plan; and

o) A blowout prevention plan.

18. Mr. Ware addressed each of these requirements in a response dated November 24, 1992. In

lieu of the surety, he enclosed a check to the Petroleum Exploration and Production Bond Trust Fund in the amount of $4,000 pursuant to Section 376.40, Florida Statutes. His response included detailed attachments describing the proposed drilling operation.

19. DEP furnished copies of the application and additional materials to interested parties, including the Big Bend Sierra Club and Florida Audubon Society, on November 25, 1992. The Sierra Club had previously sent a letter concerning Coastal's permit application. On December 18, 1992, a meeting was held to consider the materials furnished by Coastal.

20. A letter dated January 11, 1993, from Jeremy A. Craft, Director of the Division of Resource Management, to Phillip Ware addresses deficiencies in the November 1992 submittal specifically related to the site-specific photodocumentations survey, environmental conditions and assessment of impacts, hydrogen sulfide contingency plan, zero discharge requirement, and oil spill contingency plan. The letter also states that the agency completed its own natural resource damage assessment using the schedule prescribed in Section 376.121, Florida Statutes, and data submitted by Coastal, and staff determined that, in addition to joining the Petroleum Exploration and Production Trust Bond Fund, security of $500,000,000 would be required to cover potential liability for damages and $15,000,000 would be needed to cover cleanup costs.

21. Phillip Ware responded by the January 15, 1993, deadline, providing additional information and agreeing that the following would be performed as a condition of the permit: magnetometric and side sonar

surveys of the drill site, hydrogen sulfide dispersion model, and oil spill trajectory analysis. Protesting the requirement for additional surety, Coastal offered the value of its leases as evidence of its ability to pay for any damages and cleanup costs.

22. Walter Schmidt, Chief of the Florida Geological Survey, with other agency staff, reviewed the latest submittals and recommended denial of Coastal's permit, primarily based on failure to provide liquid financial surety of sufficient value "to cover any and all potential damages to the environment."

23. On February 22, 1993, the Florida Department of Natural Resources issued its final order memorializing the January 26, 1993, decision of its head, the Governor and Cabinet, denying Coastal's permit application. Consistent with the notice of rights included in the order, Coastal timely filed a petition for a formal hearing, and later requested an informal administrative hearing on the issue of the agency's authority to require additional surety.

24. Individuals with royalty interest in the potential oil and gas production petitioned and were granted leave to intervene in the administrative proceeding. No other parties intervened.

25. On December 17, 1993, the assistant secretary of DEP, acting as hearing officer in the informal proceeding, entered his Final Order denying Coastal's petition and adopting the order previously entered on February 22, 1993, as the agency final order. Coastal appealed.

26. On February 9, 1995, the First District Court of Appeal reversed denial of Coastal's application, holding that the Department had no authority to require surety in excess of that authorized by statute. See Coastal Petroleum Company v. Department of Environmental Protection, 649 So. 2d 930 (Fla. 1st DCA 1995), cert. denied, 660 So. 2d 772 (Fla. 1995).

27. During the remand to the Department, the Board of Trustees of the Internal Improvement Trust Fund voted to require a $1,900,000,000 bond as a condition of the lease and DEP again denied Coastal's application for failure to provide this additional surety. On April 26, 1996, the First District Court of Appeal again reversed the denial of Coastal's application, again holding that the Department had no authority to require surety in excess of that authorized by statute. See Coastal Petroleum Company v. Department of Environmental Protection, 672 So. 2d 574 (Fla. 1st DCA 1996) and Coastal Petroleum Co. v. Chiles, 672 So. 2d 571 (Fla. 1st DCA 1996).

28. On August 16, 1996, DEP officially notified Coastal that it had prepared and was ready to issue Permit no. 1281, but required Coastal to publish a Notice of Intent to Issue Permit. Permit no. 1281, according to the Intent to Issue, included the following special conditions:

a) Coastal shall conduct a magnetometer and side scan sonar survey;

b) Coastal shall complete comprehensive spill trajectory analyses;

c) Coastal shall complete an inventory of oil spill equipment to be stored on the drilling rig, service boats and at the Apalachicola staging location; and

d) Coastal shall prepare a hydrogen sulfide dispersion model with site specific runs.

29. On May 7, 1997, during the pendancy of this proceeding on DEP's Intent to Issue, Chapter 97-49, Laws of Florida, became law and provided authority to require additional surety for certain drilling operations in coastal waters. The new law provided that the Administration Commission would determine the amount of such surety at the recommendation of DEP. On August 11, 1997, DEP applied the new law to Permit no. 1281 and recommended the amount of the surety should be set at $4,249,637,886. On September 9, 1997, the Administration Commission voted and gave Notice and Order of Intent to Set Surety in the amount of $4,249,637,886 for Permit no. 1281.

30. In determining that Coastal was entitled to its permit, DEP staff considered the three criteria found at Section 377.241, Florida Statutes. Those criteria are addressed separately from the surety requirement in the findings of fact, below.

Permit Criteria and Conditions

a) The nature, character and location of lands involved. (Section 377.241(1), Florida Statutes)

31. The proposed drill site is south of St. George Island, Franklin County, within the outer limits of the jurisdictional waters of the state in the Gulf of Mexico. At this site the ocean floor is below approximately 40 feet of water.

32. A photodocumentation survey provided by Coastal reveals the condition of the immediate site as mostly barren sand with very sparse animal and plant life,

mostly echinoderms such as sand dollars and sea stars, and algae. Impact by a drilling rig set here on the ocean floor would be minimal due to low diversity and low density of biota, the majority of which is mobile and able to avoid direct impact.

33. The magnetometer and side scan sonar programs required by DEP and provided by Coastal reveal no geological hazards, deep-seated faults, archeological sites or anything out of the ordinary at the proposed drilling site.

34. The drilling rig and operation will have virtually no effect on the immediate site. The experience of offshore operations in Louisiana and elsewhere is that fishing is enhanced in the area by the attraction of fishes to the artificial reef created by a rig.

35. Section 377.241, Florida Statutes, which describes the three criteria guiding the issuance of drilling permits was created in 1961. The preamble of the law found at Chapter 61-299, Laws of Florida, suggests that the legislative concern for the nature of the lands involved was that owners of lands subject to oil, gas and mineral rights should not be unduly burdened or restricted from developing homes, farms, commercial uses or other appropriate land uses. This intent plainly affects land-based drilling projects more than offshore projects such as this.

36. The closest shore to the site is St. George Island, to the north. Lands to the east, west and south are many miles away. St. George Island residents and business owners are sincerely worried about the specter of oil rigs on the horizon, though there is no evidence that the single rig that is the subject of this proceeding could be seen from

any land.

37. The obvious threat to St. George and other sensitive barrier islands, to Apalachicola Bay (a special management area), to the world-renown beaches, and to the commercially and environmentally treasured lands along the Florida panhandle coast, would be from an oil spill.

38. The potential costs of a spill are addressed below in the assessment of an appropriate surety, but for the purposes of considering this first permit criteria, it is found that the chance of a damaging spill from drilling the proposed exploratory well is extremely remote.

39. Drilling operations consist of setting up a drilling rig, which is floated to the location and submerged, allowing the rig to rest on the sand bottom; driving a large diameter conductor pipe into the ground, thereby allowing all operations to be conducted within the conductor pipe; drilling the first shallow hole and setting the "surface casing" pipe; sending cement through the pipe and up the outside to seal the pipe, to close the rock layers, and to serve as a base to control the well in the event of a blowout; and continuing to drill the hole until the total depth of the well is reached, when it will again be cased in the same manner with production casing. The rock cuttings are brought to the surface by circulating drilling fluids, also known as "mud", which are water-based solutions of natural materials; then the rock bits are screened and removed so the mud may continue to circulate within the closed system.

40. The risk of oil spills from exploratory oil and gas drilling operations is very small because of the redundant systems and multiple lines of defense against

uncontrolled blowouts. The lines of defense include hydrostatic pressure control by the use of weighted drilling fluids, well control systems including redundant blowout preventors, a well control service company, and the use of trained and certified personnel. Most blowouts are gas, not oil, and most blowouts stop themselves by bridging within a few days.

41. The proposed Permit no. 1281 well is less likely to spill any oil because it will be a zero discharge well; the well will be drilled by one of the largest drilling contractors in the world, Nobel Drilling; the rig will be drilled with federally- certified crews trained in well control; the rig will be surrounded by a high seas oil fence with locks; there will be onsite oil spill equipment and personnel; there is redundant blowout equipment on this rig; and the environmental compliance officer will train all workers to observe proper procedures. The operations will be comparable to that of Getty Oil's exploration project in East Bay, which in the words of DEP's oil and gas section administrator, was "an absolutely first class operation. You could eat off the deck. Well, I wouldn't, but it looked clean enough." (transcript, p. 777)

42. The U.S. Department of Interior, Minerals Management Service (MMS) maintains statistical data based on reports of accidents occurring on the outer continental shelf (OCS) resulting in oil spills greater than one barrel (42 gallons). MMS regulations require that oil and gas operators report orally and in writing all spills of oil and liquid pollutants to the MMS District Supervisor. Data from the reports are relied on by the industry, by scientists and by regulatory agencies. According to MMS data for the years 1971-1995, out of a total of 24,237 well starts, 999 barrels of crude oil and condensate were spilled from

offshore wells under federal jurisdiction.

43. When oil is spilled on the water, natural weathering processes immediately begin to work on the oil: evaporation reduces the volume of the oil, with light oils evaporating quickly; bacteria literally begin eating the oil and oil products; sunlight degrades the oil; and the oil begins to dissolve and dissipate into the water. These natural processes are especially effective at this site because the oil involved would likely be a very light 50 API gravity oil, as is other Smackover oil in Florida; the climate is warm and the bacteria which eat the oil and oil products are plentiful in this region; the area receives much sunlight; and warmer water promotes the dissolution and dissipation of the oil into the water.

44. Oil is a naturally-occurring substance. Natural oil seeps in the Gulf of Mexico release large quantities of oil and gas into the sea that is weathered and dissipated as described above. The seeps, discovered through satellite photography, are estimated to produce as much as 120,000 barrels a year from vents in the continental shelf off the Louisiana coast.

> b) The nature, type and extent of ownership of the applicant, including such matters as the length of time the applicant has owned the rights claimed without having performed any of the exploratory operations so granted or authorized. (Section 377.241(2), Florida Statutes)

45. In 1941, the Florida Legislature enacted Chapter 20680, Laws of Florida, authorizing the Board of Trustees of the Internal Improvement Fund (Trustees) to

negotiate, sell, and convey oil and gas leases on lands and water bottoms owned by the State of Florida. Pursuant to that law, Coastal's predecessor, Arnold Explorations, Inc., acquired three leases, numbers 224-A, 224-B and 248, encompassing the territorial waters of the state along the west coast, from Apalachicola to south of Naples, as well as Lake Okeechobee and other fresh water bodies.

46. The 50+ years' history of those leases is chronicled in volumes of legal documents and court opinions commencing, it appears, with a Florida Supreme Court opinion in Watson v. Holland, 20 So. 2d 388 (Fla. 1945), which upheld the leases against a challenge by then Attorney General J. Tom Watson.

47. Proposed Permit no. 1281 is within lease 224-A, which includes the northern portion of Coastal's off-shore lease area.

48. Coastal, alone and through arrangements with other oil companies, including Mobil Oil Corporation, conducted geologic and seismic studies to locate oil and other minerals covered by the leases. Coastal, also through joint venture arrangements with other companies, drilled some exploratory wells off the west coast of Florida; these did not produce oil and were, therefore, "dry" wells. Through the years Coastal has satisfied its obligations to pay annual rentals and perform certain minimum activity under its leases.

49. In 1976, Coastal settled federal litigation between Coastal, the Trustees and the Army of Corps of Engineers, by relinquishing its exploration rights to all but the most off-shore portion of its lease area (7.36-10.36 miles offshore). Coastal retained a "residual royalty"

interest in the near shore area (coast to 4.36 miles off-shore) and surrendered altogether its interests in the middle portion. (See Coastal Petroleum v. Chiles, et al, 701 So. 2d 619 (Fla. 1st DCA 1997), which upheld denial of Coastal's inverse condemnation action based on the state's enactment of a statute prohibiting offshore oil and gas exploration in Coastal's royalty interest areas. This opinion provides an outline of the vicissitudes of Coastal's defense of its leases.)

50. Activity by Coastal over the past 50 years, through its partners and joint venturers, belies the Environmental Petitioners' claims that Coastal has "abandoned" oil exploration in favor of a more lucrative settlement or buy-out by the state (the "Greenmail" theory). For many of the 50 years, litigation has eclipsed oil, gas and mineral exploration in the vast leases. Not all of the litigation was initiated by Coastal and by all published reports none has been found to be frivolous.

> c) The proven or indicated likelihood of the presence of oil, gas or related minerals in such quantities as to warrant the exploration and extraction of such products on a commercially profitable basis. (Section 377.241(3), Florida Statutes)

51. Oil and gas exploration is a risky business. Depending on the area of the world, you may have a one in 10 chance, or one in 50 chance of hitting the right spot. If you finally hit, you must expect to pay for all of the prior misses. In the experience of Phillip Ware, the standard industry expectation is a one in 10 chance in a frontier area such as this. Permit no. 1281 would be a "wildcat" well, that is, a well drilled outside of a producing field.

52. This third criterion has rarely, perhaps only once, been used by DEP to deny an application, as DEP interprets its requirement very liberally. If the statutory criteria intended the likelihood of the presence of oil to be better than 50 percent, every application would have to be denied.

53. From the statistics maintained by the agency, Ed Garrett determined a drilling success rate in wildcat wells throughout Florida has been about 2-3 percent. Some wells drilled in a producing field come up dry, even as close as one-half mile from a producing well.

54. When DEP, through Ed Garrett and its other staff reviewers, applied the third criterion to Coastal's application the agency considered wells to the north drilled into Smackover and Norphlet, productive formations found in the northern Gulf of Mexico and inland up into Arkansas, and it determined that the siting of proposed Permit no. 1281 was reasonable.

55. The "commercially profitable" prong of the criterion is also tricky, since fluctuating oil prices engendered by wholly unpredictable world events can result in a well that is valuable when it is first drilled becoming useless by the time production and transportation facilities are established. Coastal presented sufficient evidence of the anticipated commercial profitability of the well.

56. Reasonable, competent, credible geologists can disagree, as evidenced by the range of opinions presented by the experts in this proceeding, but all agree on one immutable principle: the only way we can determine whether oil is present is to dig a hole.

57. Phillip Ware is a reasonable geologist, registered to practice geology in the State of Florida. His experience in the past 20 years has been as an employee and then president of Coastal. In the early years he operated as an oil scout and as an assistant to the vice-president, Joe Banks. In that capacity, and continuing to the present, he has monitored all relevant oil and gas activities in the area, reviewed oil and gas drilling logs, kept track of current drilling, including industry developments and rumors, and stayed current with publications and public data on oil, gas and mineral exploration.

58. In selecting the site for Coastal's application, Phillip Ware reviewed documents from the Florida Geologic Survey and elsewhere describing oil exploration wells drilled in state waters, including wells drilled by Coastal through its joint venturers, California Oil Company and Mobil. He reviewed many scholarly and scientific and industry publications; he reviewed available seismic studies as well as a map made by Joe Banks, who died in 1979. The contour lines drawn on Banks' map, as interpreted by Phillip Ware, show a promising geologic structure at the site of Permit no. 1281.

59. A geologic formation is a specific layer of rock large enough to be mapped over a large geographic area. Jurassic period Smackover and Norphlet formations have been the prolific source of oil in the Jay fields northwest of Permit no. 1281.

60. An embayment is a shallow restricted area of prehistoric sea where formations are deposited, in this case, the Smackover and Norphlet formations. The Apalachicola

embayment, centered along the present Apalachicola River, has been studied extensively in the last 20 years and its existence at the site of proposed Permit no. 1281 is the subject of substantial dispute between Coastal and the Environmental Petitioners in this proceeding.

61. After DEP issued its intent to issue the permit and the Environmental Petitioners filed their challenge raising the issue of the likelihood of finding oil, Coastal hired a series of experts who reviewed the same data considered by Phillip Ware, and other data, and derived their own opinions regarding the viability of the oil prospect.

62. Petroleum geologists describe three or four essentials for an oil field. The source rock, which is organically rich and subjected to heat over a long period, forms oil and gas. The reservoir rock may also be the source rock if there was no migration of the petroleum, but if the petroleum has migrated, the reservoir rock is its final resting place. The reservoir must have porosity and permeability to allow the petroleum to enter and move about. The structure, which may be part of the reservoir, is an upper level or trap which contains the oil. The cap rock or seal is what holds the petroleum within the structure, keeping it from escaping to the surface.

63. A structure or trap for the oil may be a geological fault or an anticline, when the cap has formed a dome shape which captures and holds the oil.

64. The process of determining whether these elements exist beneath the earth's surface, or in this case, below the ocean floor, requires the acquisition of data from prior wells. Even dry wells provide a wealth of

information. Magnetic, seismic and gravity testing (called geophysical testing) also yields valuable data.

65. From the available data, geologists are able to extrapolate and map the subsurface of a given area. The more data that is available, the more accurate is the map. Geophysical testing, however, is highly expensive, and prospects have been drilled without such site-specific tests, the interpretations of which can be subjective.

66. DEP staff geologists considered Phillip Ware's selected site as reasonable, based on their own conclusions that Smackover and Norphlet trends likely extended southeast through the Florida panhandle and into the area offshore of Franklin County. These conclusions are supported by the extensive evidence and testimony of Coastal's experts.

67. Charles Morrison gathered and reviewed all geophysical information available, chose the best of that information, had the information reprocessed using current computer methods, analyzed and correlated the information, did regional mapping, and then mapped the structures in the area. His work included identifying geologic faults, the interface of large blocks of the earth which have moved up, down or sideways, and which may also thereby create a trap for oil. He also mapped a large faulted structure or trap called an anticline, or dome, independently confirming the selection made by Mr. Ware, and he concluded that the structure was a good quality, drillable prospect.

68. Barry Faulkner, hired by Coastal to review its leases including Lease 224-A, is a professional geologist in Florida and was chief geologist for Getty Oil Company. In that position he reviewed large projects and was successful

in his analysis; he evaluated hundreds of prospects including prospects in Florida; he has laid out well-tie and speculative seismic programs near and in Florida; he has prepared basin analyses for Florida in the past; he has reviewed all the relevant geologic literature; he has reviewed all relevant logs and records of the Bureau of Geology which keeps such records; he has reviewed all of Coastal's relevant records; he has reviewed and considered Mr. Morrison's work in light of his own experience; and he performed many analyses on the above data and information. He independently concluded, based upon his analyses, that the Smackover was of sufficient thickness and that source, reservoir, seal and a trap exist in the Smackover and Norphlet geologic formations at the location of Permit no. 1281.

69. Barry Faulkner estimated the chances of source rock, reservoir rock, cap rock and trap as 80 percent, 60 percent, 80 percent and 70 percent, respectively, at the proposed well site, for a risk factor of 1 chance in 4 that the well would be productive. The Environmental Petitioners' less-thorough analysis yielded a much less optimistic estimate of 20 percent, 17 percent, 30 percent and 20 percent. Employing Barry Morrison's risk computation methodology to the deflated estimate would yield a risk factor below the 2-3 percent actual success rate supported by DEP's statistics, an example of the vast range of speculation but hardly sufficient to defeat this permit.

70. Before the 1943 Sunniland oil field was discovered (the first major field in Florida, in southwest Florida), hundreds of dry hole wells were drilled. Hundreds of dry holes were found before Florida's second major oil field, the 1969 Jay field, was established.

71. The fact that no leases were recently bid in federal off-shore waters and few oil and gas leases were entered in the last 10 years in the Apalachicola Basin is not competent evidence of any poor viability of Coastal's site. The regulatory climate, including federal and state moratoria on off-shore exploration activities, must also be considered an explanation for the inactivity.

Permit Conditions

72. Permit no. 1281, as described in DEP's intent to issue, includes 7 general permit conditions relating to compliance with other applicable laws and regulations, obtaining other required licenses or permits, notifying DEP's Oil and Gas Section in advance of drilling, and submitting required drilling logs and forms. These are standard conditions applied to any similar permit.

73. The proposed permit also includes these special permit conditions:

a) Prior to the commencement of drilling operations, Coastal shall conduct and submit to the Department for review and approval a magnetometer and side scan sonar survey.

b) Prior to the commencement of drilling operations, Coastal shall complete and submit for department review and approval comprehensive spill trajectory analyses.

c) Prior to the commencement of drilling operations, Coastal shall complete and submit to the Department for review and approval an inventory of oil spill equipment to be stored on the drilling rig, service boats, and at the Apalachicola staging location.

d) Coastal shall maintain zero discharge conditions at the drill rig site and shall utilize zero discharge

equipment as described in the application package.

e) Prior to the commencement of drilling operations, Coastal shall submit to the Department for review and approval a hydrogen sulfide dispersion model with site-specific runs. In addition, Coastal shall incorporate the site-specific information and procedures stated in the January 15, 1993, letter into the Hydrogen Sulfide Contingency Plan submitted to the Department.

f) Prior to the commencement of drilling operations, Coastal shall publish in the Apalachicola Times and post in appropriate public facilities in the region an explanation of the hydrogen sulfide warning signals and evacuation notices and procedures.

g) Coastal shall carry out bottom sampling according to the schedule described in the January 15, 1993, letter to the Department. This sampling is to detect accidental discharges of drilling muds. (CPC Exhibit No. 119)

74. Only special conditions a), b), c), and e) are still in controversy and Coastal claims that DEP does not have the authority to require these items. Under protest, each has been completed and submitted to DEP and are included in the record of this proceeding. (Inventory of equipment is CPC Exhibit no. 97; the side scan sonar survey is CPC Exhibit no. 185; the magnetometer survey is CPC Exhibit no. 186; and the hydrogen sulfide dispersion model with specific reins is CPC Exhibit no. 233.)

75. The agency had a sound rational basis to require each item. While in the beginning of the review process DEP imposed the items as part of the application submittal, it eventually adopted these requirements as permit conditions, as suggested by Phillip Ware in his January 15, 1993, response. (CPC Exhibit no. 87) The

issue is moot, as DEP concludes in its proposed recommended order; Coastal has fulfilled the special conditions and Coastal needs only to formally submit the documents, with updates where necessary.

76. The Environmental Petitioners amended their petition to delete their claim that more seismic, specifically 3D seismic testing, should be conducted as a condition of the permit. No evidence suggests that such a condition is necessary. The site selected by Coastal for its permit application is at the intersection of two good quality seismic lines, interpreted by competent expert witnesses as contributing to their credible opinions that the site is a commercially-viable prospect.

77. There was some evidence that, as a condition for the Getty Oil drilling permit off-shore of Pensacola, drilling was prohibited during hurricane season. No party here has suggested or put on evidence of the need for this condition or any special condition other than those conditions addressed above.

The Surety

78. The most significant condition of the permit is the surety required by Section 377.2425(1), Florida Statutes, to assure that the operations under the permit will be ". . . conducted in a safe and environmentally compatible manner."

79. Prior to the 1997 adoption of Chapter 97-49, Laws of Florida, any applicant had the option of either supplying cash, a bond or letter of credit; or paying an annual fee to the Minerals Trust Fund. The 1997 legislature withdrew that second option for applicants for

oil and gas exploration, drilling and production in coastal waters.

80. Specifically, Chapter 97-49 (Section 377.2425(1)(c), Florida Statutes) requires:

> (c) An applicant for a drilling or operating permit for operations planned in coastal waters that by their nature warrant greater surety shall provide surety only in accordance with paragraph (a), or similar proof of financial responsibility other than as provided in paragraph (b). For all such applications, including applications pending at the effective date of this act and notwithstanding the provisions of paragraph (b), the Governor and Cabinet in their capacity as the Administration Commission, at the recommendation of the Department of Environmental Protection, shall set a reasonable amount of surety required under this subsection. The surety amount shall be based on the projected cleanup costs and natural resources damages resulting from a maximum oil spill and adverse hydrographic and atmospheric conditions that would tend to transport the oil into environmentally sensitive areas, as determined by the Department of Environmental Protection.

(emphasis added)

81. Section 377.2425(1), Florida Statutes, as amended, denies permittees of offshore wells the option of using the Minerals Trust Fund under paragraph (1)(b). Instead, surety for wells drilled and operated in coastal waters must be covered by a surety provided as described in paragraph (1)(a) of the statute.

82. As discussed in the conclusions of law, below, Permit no. 1281 is a pending application to drill for oil and gas in coastal waters, and is subject to the surety requirement outlined in Chapter 97-49, Laws of Florida. DEP prepared and submitted its recommendation for a $4,249,637,886 surety amount to the Administration Commission. On September 9, 1997, the Administration Commission adopted the recommendation through its Notice of Intent To Set Surety.

83. The surety amount set under Chapter 97-49, Laws of Florida, must be based on the projected cleanup costs and natural resource damages of a "maximum oil spill." However, Chapter 97-49, Laws of Florida, contains no definition of that term.

84. Oil spills can occur in a number of different ways, depending upon the source (i.e., vessels, pipelines, storage tanks, and drilling or production facilities.)

85. While exceedingly rare, the most disastrous oil spills from drilling or production platforms are the result of a "blowout" from a variety of causes. A "blowout" is generally defined as an uncontrolled flow of formation fluids (oil, gas and water) up through the well bore hole, and exiting directly from the well into the atmosphere or ocean waters.

Anatomy of a Blowout

86. Oil and gas are contained within underground reservoirs at varying pressures which can amount to thousands of pounds per square inch (psi). Once a hole is drilled from the surface down into these

reservoirs, the pressurized formation fluids will tend to "migrate" or escape under extremely high pressure. To counteract this pressure, weighted drilling mud is pumped into the well. The weight of the mud resting on top of the formation fluids forms a "hydrostatic head pressure" by pressing downward to contain the pressurized fluids.

87. However, if the drilling mud is not sufficiently weighted, or there is not enough drilling mud resting on top of the pressurized fluids, the drilling mud pressing downward becomes insufficient to counteract the pressure of the formation fluids. The result is termed a "kick." A "kick" is a threatened blowout, where insufficient hydrostatic head pressure allows the influx of formation fluids into the well. The kick, and subsequent blowout, can be a subtle intrusion; or in a serious event, drilling mud and formation fluids can be expelled from the well very violently and under considerable pressure.

88. The impending high pressure of a kick is usually detected, and can be safely siphoned off under controlled conditions by way of a complex system of plumbing and gauges termed a "christmas tree." If not contained, blowouts can cause considerable damage to the drilling rig. In extreme cases, the drilling rig may collapse onto the well head, aggravating the spill and making it more difficult to halt the flow of oil from the well.

89. Blowouts are usually contained through the practice of well control. Initially, the well is monitored, and the drilling mud/formation fluid balance is carefully maintained to avoid a kick or to quickly control a kick. As a fallback, the well can be capped at the surface by use of blowout preventers or "BOPs."

90. BOPs and other devices used for well control have been standard equipment used by the petroleum industry worldwide for several decades. Located at the well head, BOPs come in a number of configurations (sheer rams, pipe rams, annular preventers, for example) and several different types are normally used in conjunction with one another as a redundant system.

91. Florida requires that BOPs be in place for all drilling and production facilities in the state as well as for those in federal waters. Permit no. 1281 requires Coastal Petroleum to use BOPs on its drilling platform.

92. The evidence and testimony adduced at trial demonstrate that widespread use of BOPs and other well control devices on a state, national and international scale has not completely eliminated the occurrence of blowouts. Blowouts, like most major accidents, are rare, but they do happen. Despite continually upgraded safety features, blowouts continue to occur worldwide, in the United States, and in the Gulf of Mexico as the result of human error or a chain of several errors or miscalculations, possibly combined with mechanical failures.

93. Such an event occurred in 1979 in the Gulf of Mexico in Mexico's Campeche Bay, an area called the "Golden Lane" because of its extraordinary oil production. The well, Ixtoc I, was a single exploratory well, in Mexican waters and governed by Mexican regulations. Its blowout resulted in the most disastrous accidental oil spill in history.

94. The Ixtoc I well was drilled by the Mexican National Oil Company (Petroleos Mexicanos or "PEMEX"). The semisubmersible drilling rig was

provided by SEDCO, Inc., of Dallas, Texas. Under a separate agreement, SEDCO also provided maintenance personnel, a rig superintendent and an assistant to advise PEMEX in the operation of the drilling rig.

95. The SEDCO 135 drilling rig was equipped with the standard BOP devices, including (1) pipe rams -- hydraulic shutters that snap shut around the drill pipe and prevent oil from flowing up in the space between the drill pipe and the casing (known as the annulus); (2) sheer rams -- hydraulic shutters that sheer through the drill pipe and block oil flowing up through the drill pipe; and (3) annular BOP -- which hydraulically inflates to further close off the annulus and seal off the space around the drill pipe.

96. On June 3, 1979, the Ixtoc I well experienced a kick while removing the drill pipe from the hole. The sudden pressure increase, in conjunction with a chain of human errors and miscalculations, quickly led to a blowout condition. The BOPs were activated, but were unable to contain the upward surge for formation fluids and the well blew out.

97. Oil and gas "gushed" from the drill pipe under extreme pressure (approximately 30 meters/100 feet into the air), and the associated petroleum fumes quickly led to a fire. All personnel were forced to abandon the drilling rig. Most of the equipment and machinery on the rig was destroyed, and the drilling tower collapsed into the sea. When the drilling rig collapsed and sank to the sea floor it buckled the marine riser and damaged the BOP stack at the well head location on the bottom.

98. Initially, the Ixtoc I well discharged oil into the sea at an estimated rate of 30,000 barrels per day,

although as much as half was consumed by the fire. This flow rate was gradually reduced during the course of the capping efforts after PEMEX contracted with several American and international firms trained in oil spill response. A massive cleanup effort was begun using firms from several counties, including the United States. However, the flow of oil from the Ixtoc well continued for nearly 295 days (almost 10 months), during which time repeated efforts were made to reduce and ultimately halt the flow. The total amount of oil discharged in the Ixtoc spill is estimated in a range between 120 and 170 million gallons. Oil reached and damaged the distant coast of Texas.

99. The extensive damage to the SEDCO 135 semisubmersible rig rendered it useless in capping the well, and ultimately two relief wells (Ixtoc 1A and Ixtoc 1B) were drilled to "kill" the well. A relief well consists of drilling a new hole down near the depth of the formation, and then intersecting the original (blownout) well from the side. Weighted drilling mud is then pumped down the relief well and into the original well in order to regain a balance between the drilling mud and the pressure of the formation, thereby halting the flow of oil up the original well.

100. A relief well can take as little as 30 days to drill, assuming no difficulties arise to slow the drilling operation. Under normal to adverse circumstances, a relief well may also take as long as three to four months to drill down to depth, locate the original well, and to intersect that well. Additionally, it will take time to locate another drilling platform, transport said platform to the site of the blowout, and to set up that platform and prepare it for drilling operations. During the time needed to locate,

transport and set up the rig, to drill the new well, to intersect the original well, and to pump weighted mud into the original well, oil may continue to flow out of the blownout well.

101. As described in paragraph 42, above, spills from offshore drilling operations in U.S. waters are exceedingly small. Equipment has been improved, personnel are better-trained and the activity is highly regulated and monitored by state and federal authorities.

The Property of Oil

102. Oil is a complex substance, actually comprised of several different types of components: volatiles, aromatics, resins and asphaltines. The volatiles include compounds such as benzene, toluene, ethylbenzene and xylene, which are highly toxic. The aromatics can include compounds with high and low molecular weights, and they, too, are highly toxic. Fortunately both volatiles and aromatics evaporate quickly and will not persist long in heavy concentrations once the oil s released into the water. The resins and asphaltines are the heavier compounds that persists much longer in the water.

103. Crude oils vary in their density. This density is usually a function of the proportion of lighter volatiles and aromatics versus heavier resins and asphaltines. The different densities of crude oil are measured on a API (American Petroleum Institute) Index, with lighter crude oils (those containing a larger portion of the volatile and aromatic compounds) registering higher on the API Index than the heavier, thicker crudes. Thus, the lighter crudes are more toxic, but a larger proportion of the compounds within these oils will evaporate and disburse more quickly.

Consistent with oil extracted from the target formations at the Jay field, any crude oil discovery at Coastal's proposed site is likely to be a very light crude with an API density between 40 and 50. In contrast, the oil spilled from Ixtoc I was between 29 and 33 degrees API.

104. Once spilled into the water, oil immediately begins a process of "weathering," whereby the chemical and physical properties of the oil are altered. The more toxic aromatic and volatile compounds quickly begin to evaporate. As much as 50 percent of the mass of the oil may be lost through evaporation into the atmosphere and dissolution into the water column within the first 48 hours.

105. At the same time, the oil emulsifies by mixing with the surrounding water. This forms an oil/water mix called "emulsion" or "mousse" which is thicker and stickier. In this emulsified mixture of oil and water, the spill can actually grow to 3 or 4 times its original mass, and can persist for a much longer period of time. As the oil emulsifies, the evaporation and dissolution of the volatile and aromatic toxic compounds is slowed. This emulsion remains potentially toxic through direct contact and ingestion, but primarily injures by smothering or through long-term exposure to organisms.

The Department's Estimate of Natural Resource Damage

106. In calculating the projected natural resource damage portion of its recommendation, DEP utilized the natural resource damage compensation schedule (the Formula) found at Section 376.121, Florida Statutes. The Formula was adopted by the Florida legislature after extensive collaboration between DEP and representatives of the petroleum industry. The Formula does not calculate

projected cleanup costs. The Formula is used to assess damage after an actual oil spill or other pollution event and, with the exception of the Coastal permit case, has never been used to estimate costs prior to an actual spill event.

107. The Formula requires the input of several factors in order to compute natural resource damages. These factors are: location of the discharge factor (designed as "L"), [Section 376.121(5)(a)1, Florida Statutes]; special management area factor (designated as "SMA"), [Section 376.121(5)(a)2, Florida Statutes]; pollutant category factor (designated as "PC"), [Section 376.121(5)(a)3, Florida Statutes]; habitat area factor (designated as "A"), [Section 376.121(5)(a)4, Florida Statutes]; volume of the discharge (designated as "V"), [Section 376.121(2)(a), Florida Statutes]; the deaths of threatened or endangered species (designated as "ETS"), [Section 376.121(6), Florida Statutes]; a base value of $1 per gallon of pollutant discharged (designated as "B"), [Section 376.121(4)(a), Florida Statutes]; and the cost of conducting a damage assessment as determine by DEP (designated as "DA"), [Section 376.121(4)(d), Florida Statutes].

108. Under the Formula, natural resource damages are compensated as follows:

> (a) The amount of compensation assessed under this schedule is calculated by: multiplying $1 per gallon . . .by the number [of gallons discharged], times the location of the discharge factor, times the special management area factor.
> (b) Added to the amount obtained in paragraph (a) is the value of the observable natural resource damage, which is calculated by multiplying the areal or linear

coverage of impacted habitat by the corresponding habitat factor, times the special management factor.
(c) The sum of paragraphs (a) and (b) is then multiplied by the pollutant category factor.
(d) The final damage assessment figure is the sum of the amount calculated in paragraph (c) plus the compensation for death of endangered or threatened species, plus the cost of conducting the damage assessment as determined by the department. Section 376.121(4), Florida Statutes.

Expressed mathematically, the Formula is represented as: {(B)(V)(L)(SMA)+(A)(SMA)} (PC)+(ETS)+(DA)

109. Utilizing the Formula to project damages from a hypothetical spill requires a series of assumptions in order to derive the variables described above; those variables are then factored in the equation.

110. The Formula requires a pollutant factor. Section 376.121(2)(b), Florida Statutes, categorizes the types of pollutants involved, and assigns a multiplier to each category of pollutant based on the severity each can have on the environment. The toxicity, dispersibility, solubility and persistence in the environment are all factors taken into account by the legislature in categorizing pollutants and assigning a multiplier to each. Section 376.121(2)(b), Florida Statutes.

111. Crude oil is contained within Category 2, along with waste oils, lubricating oils, tars and asphalts. Section 376.121(2)(b), Florida Statutes. The Formula does not distinguish between light, medium or heavy crudes (those with high, medium or low API density numbers), but instead includes all crudes within Category 2. Section

376.121(2)(b), Florida Statutes. Those pollutants listed in Category 2, including crude oils, receive a multiplier of 4 when factored into the Formula. Section 376.121(5)(a)3., Florida Statutes.

112. To derive the volume or "V" of the Formula, the actual amount of oil that is discharged directly into the water is used. The volume variable under the formula is not adjusted to consider evaporation, emulsification, dispersion or cleanup in coming up with the "V" used in the equation. The "raw" volume is used. The weathering process undergone by the pollutant is instead accounted for in calculating the amount or area of habitat injured by the pollutant or the "A" variable in the Formula. Section 376.121(2)(b), Florida Statutes.

113. Relating the Formula to Chapter 97-49, Laws of Florida, the volume or "V" must represent a "maximum oil spill." DEP considered several different methods for deriving the volume of the "maximum oil spill," including reviewing area oil spill contingency Plans and other sources for similar terminology. "Maximum Oil Spill" is not a term used in the industry or previously by regulatory agencies.

114. DEP ultimately settled on basing its spill volume on the Ixtoc I blowout described above, utilizing 150 million gallons (a mid-range between the estimated 120 and 170 gallons spilled over time by Ixtoc I) for a total of approximately 3.5 million barrels.

115. In deriving the habitat factor (A) to plug into the Formula, it was necessary for DEP to assume a spill boundary -- the total area within which some resources would be affected by the spilled oil. In its recommendation

to the Administration Commission, DEP identified a spill boundary extending from Gulf County and east and south to the Hernando/Pasco county line -- a distance of 222.8 miles. The counties included within this area of potential impact were: Gulf, Franklin, Wakulla, Jefferson, Taylor, Dixie, Levy, Citrus and Hernando Counties. Conjecture that the spill would flow primarily west, rather than east, resulted in less damage and therefore less than the statutory "maximum."

116. The Department relied on a number of sources in deriving the spill boundary for its "maximum oil spill" under the statute. Initially, the Department reviewed hypothetical spill trajectory models prepared in conjunction with proposed oil and gas leasing in federal waters off southeast Florida. As with the spill volume, the Department rejected the use of a hypothetical model and instead referred, in part, to data from past oil spills.

117. On March 24, 1989, the oil tanker Exxon Valdez ran aground, spilling 11.2 million gallons of crude oil into Prince Williams Sound, Alaska. Containment was highly effective for the first three days, but when the winds and seas increased with a storm event, the oil was blown beyond any hope of containment. The oil traveled on a 70-mile trajectory. Field surveys identified 790 miles of shoreline within Prince Williams Sound which received oil, over 200 of which were classified as heavily oiled. Additionally, more than 2400 miles of shoreline in the Kenai Peninsula/Kodiak Island region were found to be oiled.

118. The Department also relied on data submitted by Coastal Petroleum as part of the application for Permit no. 1281. In particular, the Department referred to

Coastal's November 23, 1992, and January 15, 1993, submittals. In its November 23, 1992, submittal, Coastal evaluated the potential impacts of an oil spill, confining their search to a specifically identified area between St. Joseph Bay in Gulf County to Anclote Key in Hernando County. In its January 15, 1993, submittal Coastal, then conducted an economic analysis of these same areas. In that analysis, the Gulf, Franklin and Wakulla County area is designated as the "primary impact area" while the remaining 15 counties to the east and west are designated as "secondary impact areas."

119. In deriving the habitat areas within DEP's spill boundary, the Florida Marine Research Institute, a bureau of the agency, was used. Using a comprehensive Florida Marine spill Analysis System (a subset of the Marine Resource Geographic Information System) database, acreages for habitat and linear beach were provided. The compensations schedule for various forms of habitat is found in Section 376.121(5)(a)4., Florida Statutes.

120. In computing the projected habitat coverages (A) within the defined spill boundary, DEP did not assume that the oil would damage or destroy 100 percent of all habitat types within this boundary. Rather, the agency accounted for evaporation and dissolution of the oil, and assumed some cleanup efforts would be underway.

121. For those habitats that are principally submerged for the majority of the time (such as seagrasses) only 1 percent of those resources within the spill boundary were assumed to suffer damage. DEP reasoned that the oil would float over top of these submerged habitats. Only a very small percentage of seagrasses in shallow water would be impacted by oil. This would typically occur during low

tide, or by oil that has begun to settle into the water column.

122. For emergent habitats that are located along the shoreline or within the intertidal zone, DEP assumed a five-times greater possibility of exposure to oil. Thus, for habitats such as saltmarsh, mangrove and oyster reef, it was assumed that the maximum oil spill would damage 5 percent of the total area of these resources.

123. Sandy beach habitat, by virtue of its location relative to the well and within the intertidal zone, was found to be at much greater risk. For that reason, the agency assumed damage to 25 percent of the linear area of sandy beach within the spill boundary.

124. These same assumptions, with one notable exception, were originally used in calculating the previous two surety amounts prior to the passage of Chapter 97-49, Laws of Florida. The notable exception was for sandy beach. In the most current surety calculation, coverage of sandy beach was reduced from 50 percent down to 25 percent to reflect the general absence of that environment throughout much of the spill boundary area.

125. In computing the projected natural resource damages, the Formula treats natural resource damages differently when they occur within a special management area. Those resources damaged within a special management area are multiplied by an additional special management area factor (SMA). Section 376.121(5)(a)2., Florida Statutes. Special management areas are defined by statute as "areas designated because of their unique habitats; living resources; recreational use; aesthetic importances; and other ecological, educational, consumptive, intrinsic,

scientific, and economic values." Section 376.121(2)(c)2., Florida Statutes. Special management areas include: state parks; recreation areas; national parks, seashores, estuarine research reserves, marine sanctuaries, wildlife refuges, and national estuary program water bodies; state aquatic preserves and reserves; classified shellfish harvesting area; areas of critical state concern; federally designated critical habitat for endangered or threatened species; and outstanding Florida waters. Section 376.121(2)(c)2, Florida Statutes.

126. Most of the area in question is within some form of special management area as defined by statute. DEP's recommendation assumed that the 1 percent, 5 percent and 25 percent of the overall habitats damaged by the maximum oil spill would be within any one of these several special management areas.

127. The Formula also requires a location of discharge factor. Section 376.121(5)(a)1, Florida Statutes. Under the statute, the location factor is either 8 (representing inshore discharges); 5 (representing nearshore discharges) or 1 (representing offshore discharges). Section 376.121(5)(a)1.a., Florida Statutes. Since the proposed well and origin of the discharge is an offshore well located 9 miles off the coast, a location of the discharge factor of 1 was used.

128. The Formula also includes a factor for the death of any endangered or threatened species (ETS). Compensation for the death of any animal designated as an endangered species is $10,000 per animal, while each threatened species killed is compensated at $5,000 per animal. Section 376.121(6), Florida Statutes. For the purposes of DEP's surety recommendation, no endangered

or threatened species were presumed killed and no specific evidence was provided by any party to determine any better estimate for this factor.

129. The Department assumed $10,000 administrative costs for the final factor in the Formula (DA) described in paragraph 107, above.

Coastal's Methodology for
Projecting Natural Resource Damages

130. Dr. Deborah French was qualified as an expert in oil spill events. Since 1985 she has been performing oil spill modeling and working on models to be used for calculating natural resource damage assessments for a variety of clients, including the U.S. Department of Interior (DOI) and the National Oceanic and Atmospheric Administration (NOAA). She has also worked on environmental impact assessments and is widely published.

131. Dr. French prepared Coastal's "Oil Spill Trajectories and Analysis of Maximum Credible Natural Resources Damages", having already been involved in developing the computerized system for natural resources damage assessments under contract with DOI.

132. Dr. French's model is widely used throughout the world by governments and private industry to predict the movement of oil on water and to the shore. The model has been validated by comparison with numerous actual oil spills and is a reliable and reasonable way to determine which habitats could be damaged or require cleanup because of a hypothetical oil spill.

133. The model takes into account relevant data of

various kinds to predict the movement and fate of oil spilled on the water, including the precise location, the flow rate of the well, the duration of the flow, the characteristics of the oil, the wind record, the record of water currents, a digitized geographic map including water depths, and the digitized types and location of the habitats in the area. Dr. French utilized the precise location of Permit no. 1281. Dr. French used two flow rates for the well, a "maximum probable" flow rate of 1,654 barrels per day and in the event it were determined to be applicable, a "worst case" flow rate of 5,948 barrels per day.

134. These flow rates are the average and highest initial flow rates of the 122 producing wells in the Jay oil field from the Smackover geologic formation, the target of the Permit no. 1281 well.[2] Although these flow rates are not blowout rates (and none of these wells has blown), it is reasonable and reliable to use them as a predicted rate because the Jay oil field is a large sample of the target Smackover formation in Florida; the Jay Smackover flow rates are flow rates after acid stimulation and not the two or three times smaller unstimulated natural rates; and DEP's own expert, Ed Gambrell, admitted that he would expect that if a blowout occurred it would be two or three times the flowing rate. Thus, it is likely the stimulated figures represent a blowout condition from the same well in the unstimulated natural condition it would be in at the time of drilling.

135. DEP's choice of the volume of Ixtoc as the basis for the agency's calculation is neither reasonable nor reliable because of the unique characteristics of that well: its extraordinary rate of flow; its extraordinary duration of flow; the fact it was located in Mexican waters, governed by Mexican regulations and attitudes; and it was at a time

before the industry became more sophisticated and highly regulated. The Ixtoc well was drilled into one of the most prolific areas in the world, that is, "the Golden Lane," an area noted for unusually high flow rates. One well there flowed 455,000 barrels per day, and the Ixtoc well itself was estimated to flow 30,000 barrels per day. Initial production rates there are some of the highest in the world. In contrast, the Smackover geologic formation in Florida is far less productive, with wells averaging less than 2,000 barrels a day of flow after stimulation to enhance their even lower unstimulated natural flow rates. Dr. Schmidt, who selected the Ixtoc well volume, admitted he did not expect another "Golden Lane" off Apalachicola.

136. In addition to flow rate, duration is also important to the volume of a spill. The Ixtoc well flowed for 295 days before it was brought under control. Other wells have never flowed for such a duration before being brought under control. In fact, even without being brought under control, most wells bridge off by themselves within a few days.

137. Dr. French used two durations of flow: a "maximum probable" duration of 5 days and, in the event it were applicable, a "worst case" duration of 21 days. Her model is conservative, as it assumes no cleanup, burning or other diminution of the spill amount.

138. Within 24 hours, more than 50,000 barrels a day of oil spill recovery capacity could be on site and the HOSS barge system, which can recover 18,000 barrels a day by itself, could be deployed in a few hours. Conservatively, the well would be brought under control in 3 weeks in the unlikely event it were to blowout. There is a very large capability in and near Florida for cleanup and

capture in 2 days; the use of 5 days allows for weather problems as well as setup of the HOSS barge, the use of 21 days is an outside limit worst-case scenario.

139. The Department attempted to show a longer duration should be used based on a possibility that a relief well would be required to kill the flow. There has never been such a case in the U.S. Gulf of Mexico offshore areas in the last fifteen years in thousands of wells. The only such case pointed to, in Louisiana, involved a very complex multiple well production platform.

140. The maximum probable rate of 1,654 barrels per day multiplied by the maximum probable duration of 5 days, or 8,270 barrels, is a maximum probable. It would be reasonable and reliable to use this as the maximum oil spill for calculating the amount of the surety because this exceeds by more than eight times the total spillage from all exploratory wells drilled in the United States Gulf of Mexico federal waters in the last 25 years. If the worst case situation were determined to be proper, the worst case rate of 5,948 barrels per day multiplied by the worst case duration of 21 days, or 124,908 barrels, is the volume of the worst case oil spill. No well in the history of the United States oil production has ever spilled more oil than this volume.

141. Dr. French utilized the characteristics of a South Louisiana API gravity 35 crude oil, but the expected oil from the 45-50 API gravity oil from the Smackover geologic formation is a much lighter oil. Dr. French's use of this medium crude oil makes her conclusions very conservative because a greater percentage of the lighter oil will quickly evaporate. Dr. French used the wind record gathered by NOAA at a buoy near St. George Island, which

is reasonable and reliable because these are actual winds recorded in the area by the federal government. Dr. French used water currents calculated from recorded winds, because there is no recorded current information. Currents in this area of the Gulf of Mexico are an insignificant factor. She used a hydrodynamic model provided by Dr. Wilton Sturges at Florida State University (FSU) and from that was able to obtain data on currents for the same area and time as the wind data for the analysis.

142. By using the above factors, Dr. French used a maximum oil spill and the most adverse hydrographic and atmospheric conditions in her analyses which would be most likely to damage habitats in the area.

143. Dr. French used depth data maintained and distributed by the U.S. Department of Commerce, National Geophysical Data Center. Finally, Dr. French used the digitized types and location of the habitats in the area she obtained from Dr. Jacqueline Michel, which maps and data were prepared for and accepted by the State of Florida and used by DEP in calculating its own habitat damages.

144. With this data for the maximum probable and worst case scenarios, Dr. French ran 200 trajectory analyses for each of five times of the year from the wind record. Dr. French used this stochastic mode (trajectory analysis) to determine the potential or probability of any spot in the entire area to be touched by oil in any amount for each time of the year. This also allowed her to determine the transport time to any area and her analysis revealed two things with particular relevance: spills in June were the worst case in transporting oil toward shore and sensitive habitats; and that by the time oil got to Lighthouse Point to the east, the very light oil had weathered for eight

days and what remained was in a nontoxic state.

145. From the wind record Dr. French identified the most adverse winds for each scenario which would transport oil the fastest to shore so as to be least weathered and most toxic to maximize the habitat that could be damaged. The historic winds that would transport the oil the fastest to shore occurred beginning June 1, 1989, and were 12 knots to the northeast for the worst case scenario and to the north for the maximum credible scenario. This choice of wind was reasonable and reliable to use to maximize the habitat that could be damaged by each scenario because although winds in excess of this have occurred, winds greater than 12 knots entrain the oil and reduce its impact on habitats. The effects of high winds, including hurricanes, during a spill event is to hinder response efforts. Hurricanes themselves can have a beneficial effect of scrubbing clean the shoreline.

146. Having identified the events with a maximum potential for damage to habitats near the Permit no. 1281 location, Dr. French ran specific data for each scenario to determine the actual habitat that would be damaged from the hypothetical spill. The runs of these two scenarios, that is, maximum credible and worst cases, identified the habitats that would be affected by the hypothetical spill.

147. Dr. French utilized her model and analyses in deriving compensation estimates under the Florida Natural Resource Damage Assessment. She found, however, that the Formula is not clear on the appropriate threshold thickness where a habitat is considered oiled enough to be injured. The Formula, since it applies to damage assessment after a spill, would rely on field observations of actual, rather than forecasted, impacts to habitats.

148. Based on scientific literature describing field observations after oil spills, Dr. French and her firm developed a model for federal natural resource damage assessments. That model includes a 14 millimeter threshold. DEP used a
1 millimeter threshold for its analysis, so Dr. French included runs of both thresholds in her application of the Florida NRDA compensation schedule. She opined, however, that a 1 millimeter oil slick would unlikely significantly injure a shoreline habitat or a submerged habitat, since in the latter habitat, exposure to oil is from entrained or dissolved oil in the water under the slicks.

149. The results obtained by Dr. French under the scenarios applying the direction of spill likely to oil and effect the greatest amount of shoreline and habitat are as follows:

	NE 21 days (worst case)	NE 5 days (maximum credible)
> 14 millimeter	$43,905,858	$ 2,781,318
> 1 millimeter	$86,510,064	$ 2,930,214

Projected Cleanup Costs

150. In addition to projected natural resource damage, Chapter 97-49, Laws of Florida, requires the surety amount recommended by DEP and adopted by the Administration Commission to include projected cleanup costs.

151. In developing projected cleanup costs for the

"maximum oil spill" DEP initially contacted several industry trade groups and corporations experienced in oil spill cleanups. The unanimous response was that no two spills are alike. There are so many variables to take into account that it is impossible to find an "average" cost for cleanup of an oil spill.

152. The agency then looked to the recent experience of the 1993 Tampa Oil Spill, resulting from a collision of barges and a tanker, spilling heavy, persistent, no. 6 fuel oil. Specifically, DEP looked to what it had: an unaudited reimbursement claim for cleanup submitted by the responsible party in the amount of $53,000,000. The actual amount spent on cleanup of the Tampa Bay Oil Spill may be over $70,000,000. However, since the reimbursement claim had not yet been audited to verify the amounts claimed, DEP conservatively used the lower number.

153. The agency then divided the smaller number ($53,000,000) by 14, the number of miles of affected shoreline. Then, again in light of the uncertainty as to what might have been included in the reimbursement claim, the Department further reduced the amount by nearly a third, resulting in $2.5 million per mile of shore to be cleaned. That amount, when multiplied by the 222.8 miles of linear coast within DEP's spill boundary for a Coastal spill, produced a figure of $557,000,000. That calculation excluded an additional 20 miles of seawalls that required pressure cleaning as a consequence of the Tampa spill.

154. In determining the extent of shoreline requiring cleanup, DEP utilized a linear coastline measurement, rather than measuring the sinuosity of the shoreline. This linear coastline measurement thus

conservatively excluded additional miles attributable to rivers, inlets, bays and streams. In contrast, Dr. French's trajectory model predicts real shoreline effects.

155. The DEP cleanup estimate, like its damage estimate, is flawed and unreliable. It is based on a unique event with little in common with the circumstances surrounding any possible Coastal well blow out. Cleanup costs are highly related to the type of oil spilled, the geography of the area in which it is spilled, and the rate of the spill, among other factors.

156. The Tampa Bay spill was a complex event involving a collision of three ships and a fire. The oil released was very heavy, with an API gravity of 10.5, a sticky viscous, coating substance which persists on the shoreline. Often no shoreline cleanup is attempted for lighter oils as they tend to be washed off by the tides and small storms, and mechanical interference often exacerbates the damage.

157. The DEP estimate of shoreline length is based, not on
an actual trajectory study, but on a misunderstanding of earlier Coastal submittals and a "thumbnail guess."

158. Jacqueline Michel was Coastal's expert regarding cleanup costs. She has a Bachelor's degree in geology, a Masters in hydrogeology, and a Ph.D. in geochemistry, and she has been involved in oil spill cleanup and response and assessment since 1976, including Ixtoc's effect in South Texas, the Exxon Valdez, and the Tampa Bay spill referenced above. She and her company are part of a government response team under contract with the federal government, and she is involved in about 50 oil

spills a year, from various causes, all over the world.

159. Dr. Michel's company has developed a digitized data base creating an atlas of oil sensitive habitats, biological resources and human resources that might be sensitive to an oil spill. Called Environmental Sensitivity Index (ESI) maps, these data collections are obtained from existing agencies with whom the company works closely to assure that the collections are accurate and usable. One such agency is the Florida Marine Research Institute (FMRI), within DEP.

160. Dr. Michel's cleanup costs assessment for Coastal included these steps:

1. Obtain information on the duration and coverage of oil slicks on water and the areal and lineal extent of shoreline oiling by habitat type from the trajectory modeling work by Applied Science Associates, Inc. (ASA, 1997)(Dr. French)
2. Obtain unit costs for labor, equipment, supplies, etc. from published summaries (Etkin, 1994), spill response contractors, and other vendors.
3. Derive level of effort estimates for different types of response and cleanup efforts, from documentation of previous spills and guidelines provided by spill response contractors in the Gulf of Mexico.
4. Use unit costs and level of effort to estimate daily costs for different components of a response and cleanup operation. Components included:
    a. On-water recovery (both offshore and nearshore skimming operations);
    b. Shore-based support for skimming operations and handling/disposal of

recovered liquids;

c. Commercial aircraft support for overflights;

d. Shoreline cleanup operations, including bird rescue and cleaning;

e. Federal agencies' cost for response;

-U.S. Coast Guard (including the National Strike Force)

-U.S. Navy

-National Oceanic and Atmospheric Administration

-Department of Interior

-U.S. Environmental Protection Agency

f. State agencies' cost for response

g. Disposal of oily wastes

5. Develop total costs for the two release scenarios; and

6. Compile recent oil spill costs for representative spills and develop tables on costs/gallon spilled.

(Coastal Exhibit no. 394)

161. Dr. Michel's estimate included cleanup of oil with a thickness of 1 millimeter or greater since this thickness is assumed to generate sheens that respond to sorbents and sorbent booms in marshes and manual or mechanical removal from beaches. No oil recovery off-shore was considered in the analysis of the amount of shoreline contamination, resulting in a conservative, credible estimate.

162. Based on trajectory data provided by Dr. French and the resultant "worst case" and "maximum probable" scenarios Dr. Michel determined cleanup costs of $137,968,507 (worst case) and $19,713.046 (maximum

probable).

A "Reasonable" Surety

163. Returning to the Formula in Chapter 376.121, Florida Statutes, the most significant difference between DEP's methodology and Coastal's is the assignment of a value for volume.

164. In spite of its being a real life example of a maximum oil spill, Ixtoc I is not a reasonable source for deriving the volume of a maximum oil spill at the proposed permit site. That "it happened" does not mean that it will happen here. The geology and geography of the site, the level of regulatory scrutiny, and the quality of staff and equipment proposed by the applicant and required by the agency, must be considered to determine a "reasonable" surety specific to this single well-drilling permit.

165. Volume in Dr. French's application of the formula was derived from the most relevant data available: wells drilled in the target Smackover formation 140 miles to the northwest. While the "maximum probable" scenario she adopted is plainly more likely, her "worst case" scenario better effectuates the legislature's directive that the surety be based on a "maximum oil spill."

166. For reasons discussed above, Dr. French's trajectory method is credited and best reflects the "adverse hydrographic and atmospheric conditions that would tend to transport the oil into environmentally sensitive areas." Her trajectory established that oil from a 21-day worst case spill would reach almost the same distances as DEP's projection, but she reasonably factored the density of the oil and determined that its toxicity, and damage potential would be

mitigated by the time most of the shoreline was oiled.

167. It is highly unlikely that injury to most habitat will occur with a threshold thickness of less than 14 millimeter of oil, but competent evidence of the sensitivity of nursery and breeding habitat and of organisms related to early stages of the life cycle of shellfish and other creatures, supports adopting the more conservative scenario, with 1 millimeter thickness of oil.

168. Appropriately, and consistent with DEP's application of the formula, Dr. French considered a factor of 2 for "special management area" since a hypothetical discharge will originate outside of a special management area but will impact natural resources within the Apalachicola Bay special management area.

169. Dr. French, like DEP, considered a factor of 4 for the category of pollutant (category 2, in the statute includes crude oil). The Formula does not refine categories of crude into light or heavy API density, but if it did, the light crude anticipated from the source at issue would likely merit a factor of 2 or 3. In her trajectory model, Dr. French assumed the density of Louisiana crude, a heavier, less volatile oil, rendering her results as to area coverage very conservative.

170. In summary, the most reasonable, best-supported estimate of natural resource damages resulting from a "maximum oil spill and adverse hydrographic and atmospheric conditions that would tend to transport the oil into environmentally sensitive areas" is $86,510,064. (Coastal Exhibit no. 391, tables 5.6 and 5.12)

171. $86,510,064, added to Dr. Michel's "worst

case" response and cleanup estimate of $137,968,507, plus $10,000 DEP administrative costs, results in a reasonable surety amount of $224,488,571.

Costs and Attorney's Fees

172. Both Coastal and the Environmental Petitioners have included requests for costs and attorney's fees in their respective petitions. This lengthy proceeding, competently and diligently tried by all parties, yields no evidence of bad faith or improper purpose or any other basis for award of fees cognizable under Chapter 120.

CONCLUSIONS OF LAW

173. The Division of Administrative Hearings has jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

174. Coastal has an outstanding motion to dismiss the petition of the Environmental Petitioners on the ground that they lack standing. Specifically, Coastal contends that these parties were on notice of DEP's original intent to deny the drilling application for lack of a sufficient bond. Coastal's challenge to that decision to deny was the proceeding described in Findings of Fact paragraphs 23-26, above. Coastal argues that the Environmental Petitioners could have, and should have participated in that proceeding, and having failed to do so are now precluded from participating in the ongoing dispute.

175. There is evidence, as found above, that Sierra Club and Florida Audubon Society had notice of the pending application, but no evidence that Florida Wildlife Federation had notice. The "clear point of entry" for that

party was not available until after DEP's notice of intent to grant the permit was issued in August 1996.

176. That notice of intent and the requirement imposed by DEP pursuant to its Rule 62C-103.150(2), Florida Administrative Code, that Coastal publish notice of the intent to issue, was the subject of Coastal's interlocutory appeal dated August 27, 1996. The briefs and Coastal's petition have been considered though official recognition (Transcript, vol. I, p. 25) and as Environmental Petitioners' Exhibit no. 128.

177. On February 10, 1997, the First District Court of Appeal denied Coastal's Petition; on March 3, 1997, it denied Coastal's Motion for Clarification. It appears that the appellate court has disposed of the issue. If it has not, however, disposed of the issue on its merits, there is good and adequate basis as argued in the Environmental Petitioner's briefs in the appeal to now deny Coastal's Motion to Dismiss. The motion is thus DENIED.

178. DEP has authority to issue permits to drill wells for oil and gas pursuant to Chapters 403 and 377, Florida Statutes, and its rules found at Chapters 62C-25 through 62C-30, Florida Administrative Code. Section 377.22, Florida Statutes, provides, in pertinent part:

> 377.22 Rules, regulations, and orders.–
>
> . . .
>
> (2) The department shall adopt such rules and regulations, and shall issue such orders, governing all phases of the exploration, drilling, and production of oil, gas, or other petroleum products in the state, including exploration, drilling, and production in the offshore waters of the state as may

be necessary for the proper administration and enforcement of this chapter. Such rules, regulations, and orders shall ensure that all precautions are taken to prevent the spillage of oil or any other pollutant in all phases of the drilling for, and extracting of, oil, gas, or other petroleum products. The department shall revise such rules and regulations from time to time as may be necessary for the proper administration and enforcement of this chapter. Rules, regulations, and orders promulgated in accordance with this section shall be for, but shall not be limited to, the following purposes:

(a) To require the drilling, casing, and plugging of wells to be done in such a manner as to prevent the pollution of the fresh, salt, or brackish waters or the lands of the state.

(b) To prevent the alteration of the sheet flow of water in any area.

(c) To require that appropriate safety equipment be installed to minimize the possibility of an escape of oil or other petroleum products in the event of accident, human error, or a natural disaster during drilling, casing, or plugging of any well and during extraction operations.

(d) To require the drilling, casing, and plugging of wells to be done in such a manner as to prevent the escape of oil or other petroleum products from one stratum to another.

(e) To prevent the intrusion of water into an oil or gas stratum from a separate stratum, except as provided by rules of the division relating to the injection of water for proper reservoir conservation and brine disposal.

(f) To require a reasonable bond, or other form of security acceptable to the department, conditioned

upon the performance of the duty to plug properly each dry and abandoned well and the full and complete restoration by the applicant of the area over which geophysical exploration, drilling, or production is conducted to the similar contour and general condition in existence prior to such operation.

(g) To require and carry out a reasonable program of monitoring or inspection of all drilling operations or producing wells, including regular inspections by division personnel.

(h) To require the making of reports showing the location of all oil and gas wells; the making and filing of logs; the taking and filing of directional surveys; the filing of electrical, sonic, radioactive, and mechanical logs of oil and gas wells; if taken, the saving of cutting and cores, the cuts of which shall be given to the Bureau of Geology; and the making of reports with respect to drilling and production records. However, such information, or any part thereof, at the request of the operator, shall be exempt from the provisions of s. 119.07(1) and held confidential by the division for a period of 1 year after the completion of a well.

(i) To prevent wells from being drilled, operated, or produced in such a manner as to cause injury to neighboring leases or property.

(j) To prevent the drowning by water of any stratum, or part thereof, capable of producing oil or gas in paying quantities and to prevent the premature and irregular encroachment of water which reduces, or tends to reduce, the total ultimate recovery of oil or gas from any pool.

(k) To require the operation of wells with efficient gas-oil ratio, and to fix such ratios.

(l) To prevent "blowouts," "caving," and "seepage," in the sense that conditions indicated by such terms are generally understood in the oil and gas business.
(m) To prevent fires.
(n) To identify the ownership of all oil or gas wells, producing leases, refineries, tanks, plants, structures, and storage and transportation equipment and facilities.
(o) To regulate the "shooting," perforating and chemical treatment of wells.
(p) To regulate secondary recovery methods, including the introduction of gas, air, water, or other substance into producing formations.
(q) To regulate gas cycling operations.
(r) If necessary for the prevention of waste, as herein defined, to determine, limit, and prorate the production of oil or gas, or both, from any pool or field in the state.
(s) To require, either generally or in or from particular areas, certificates of clearance or tenders in connection with the transportation or delivery of oil or gas, or any product.
(t) To regulate the spacing of wells and to establish drilling units.
(u) To prevent, so far as is practicable, reasonably avoidable drainage from each developed unit which is not equalized by counterdrainage.
(v) To require that geophysical operations requiring a permit be conducted in a manner which will minimize the impact on hydrology and biota of the area, especially environmentally sensitive lands and coastal areas.
(w) To regulate aboveground crude oil storage tanks in a manner which will protect the water resources of the state.

(x) To act in a receivership capacity for fractional mineral interests for which the owners are unknown or unlocated and to administratively designate the operator as the lessee.

(Emphasis added). The conditions imposed by DEP on Coastal's permit are well within the ambit of the agency's authority described above. Those conditions have been satisfied and Coastal's protest is essentially moot; however, because of the several years that the application has been pending, the inventory of oil spill equipment should be updated.

179. Section 377.241, Florida Statutes, provides:

377.241 Criteria for issuance of permits.–
The division, in the exercise of its authority to issue permits as hereinafter provided, shall give consideration to and be guided by the following criteria:
(1) The nature, character and location of the lands involved; whether rural, such as farms, groves, or ranches, or urban property vacant or presently developed for residential or business purposes or are in such a location or of such a nature as to make such improvements and developments a probability in the near future.
(2) The nature, type and extent of ownership of the applicant, including such matters as the length of time the applicant has owned the rights claimed without having performed any of the exploratory operations so granted or authorized.
(3) The proven or indicated likelihood of the presence of oil, gas or related minerals in such quantities as to warrant the exploration and

extraction of such products on a commercially profitable basis.

180. As applicant, Coastal has the burden of establishing by competent substantial evidence its entitlement to the permit it seeks. Florida Dept. of Transportation v. J.W.C., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). Coastal has met that burden for Permit no. 1281.

181. The first criterion, on its face, has a more limited application than that proposed by the Environmental Petitioners. The legislature's intent to preclude drilling in coastal waters is effectuated not in Section 377.241, Florida Statutes, but in Section 377.242, Florida Statutes, which includes a specific exception for leases entered prior to June 7, 1991. As found above, Coastal's permit meets the first criterion.

182. Coastal's lease 224-A includes requirements for lease payments and for certain minimal drilling or exploration activity. As found above, Coastal has satisfied those requirements and there is no competent evidence that it has abandoned its drilling rights under the lease. Coastal's permit meets the second criterion.

183. The third criterion does not suggest that the prospect for finding oil must be a sure thing. Every expert testifying on this issue in this proceeding agreed that petroleum exploration is a risky business. Even in a proven productive field, dry holes are drilled. Petroleum geologists rely on data obtained from a variety of sources to select a drilling site, but only the drilling itself can determine with certainty what lies beneath that site. A wealth of credible evidence was presented by the parties on

this issue. No evidence could utterly foreclose the possibility that Phillip Ware's prospect is all that he predicts. The greater weight of evidence establishes that it is as least worth a look.

184. Nothing in the text of the three criteria require consideration of the applicant's "motive." If the Environmental Petitioners are correct in their apprehension of "Greenmail" by Coastal to induce the state to buy its lease or to support a claim of inverse condemnation or "taking," the surest way to dissipate those motives is to permit the drilling.

185. The Attorney General and Environmental Petitioners argued at hearing that the unlikelihood of oil was established at the non-jury trial in the Leon County Circuit Court in Coastal's "taking" case related to its retained royalty interests in the nearshore (coast to 4.36 miles offshore) portion of its lease 224-A as modified by settlement in 1976. That "taking" case, Coastal Petroleum Company v. Chiles, was decided first by Circuit Judge Philip J. Padovano on August 5, 1996, and then was affirmed by the First District Court of Appeals on November 5, 1997 (701 So. 2d 619). A footnote in the appellate opinion reiterates the trial court's finding: "We read the trial court's factual determination to indicate that based upon surrounding circumstances, it was purely speculative as to whether any oil existed in this area, a determination which is supported by the evidence contained in the record." [footnote 2, at p. 625]

186. Assuming that the parties, who did not pursue their res judicata or collateral estoppel theory in their proposed recommended order, have not abandoned their argument, there is no way to construe the court's finding to

defeat a drilling permit. Mere speculation that oil exists or does not exist does not offend the third criterion in the grant of a drilling permit. (See also Coastal's discussion of res judicata and collateral estoppel in its proposed recommended order, pp. 60-61.)

187. After the three criteria of Section 377.121 have been satisfied, there remains only the permit condition related to an appropriate surety, the primary source of controversy since the application for permit was first submitted in 1992. Constitutional issues will be resolved in another forum, but factual evidence was thoroughly presented and considered in this proceeding to effectuate the intent of the legislature in Chapter 97-49, Laws of Florida.

188. That recent enactment, codified at Section 377.2425(1)(c), Florida Statutes, provides:

> 377.2425 Manner of providing security for geophysical exploration, drilling, and production.–
> (1) Prior to granting a permit to conduct geophysical operations; drilling of exploratory, injection, or production wells; producing oil and gas from a wellhead; or transporting oil and gas through a field-gathering system, the department shall require the applicant or operator to provide surety that these operations will be conducted in a safe and environmentally compatible manner.
> . . .
> (c) An applicant for a drilling or operating permit for operations planned in coastal waters that by their nature warrant greater surety shall provide surety only in accordance with paragraph (a), or similar proof of financial responsibility other than as provided in paragraph (b). For all such applications,

> including applications pending at the effective date of this act and notwithstanding the provisions of paragraph (b), the Governor and Cabinet in their capacity as the Administration Commission, at the recommendation of the Department of Environmental Protection, shall set a reasonable amount of surety required under this subsection. The surety amount shall be based on the projected cleanup costs and natural resources damages resulting from a maximum oil spill and adverse hydrographic and atmospheric conditions that would tend to transport the oil into environmentally sensitive areas, as determined by the Department of Environmental Protection.

(Emphasis added). Coastal's application was "pending" in 1997 upon the effective date of the act.

189. When there is a change in law in a licensure matter governed under Section 120.60, Florida Statutes, the law at the time of the final decision rather than when the application was filed determines whether the license should be granted. Agency for Health Care Administration v. Mount Sinai Medical Center of Greater Miami, 690 So. 2d 689, 691 (Fla. 1st DCA 1997); Lavernia v. Department of Professional Regulation, 616 So. 2d 53 (Fla. 1st DCA 1993).

190. A Notice of Intent to Issue a permit merely constitutes "proposed agency action" which only becomes "final agency action" if no administrative proceeding is timely initiated pursuant to Sections 120.569 and 120.57, Florida Statutes, or if a hearing is requested, after a Final Order has been entered by the permitting agency either granting or denying the permit. Capeletti Brothers, Inc. v.

State Department of Transportation, 362 So. 2d 346, 348-49 (Fla. 1st DCA 1978). The administrative activity leading up to the issuance of a Notice of Intent has been characterized as "free form" agency action, and as such, the decision produced is merely preliminary. Florida Department of Transportation v. J.W.C. Company, Inc., supra, at 786. Capeletti Brothers, Inc., supra, at 348-49. Where an administrative hearing is requested, a de novo review of the proposed agency decision is conducted by an Administrative Law Judge. Such a hearing is designed to formulate final agency action. McDonald v. Department of Banking and Finance, 346
So. 2d 569, 584 (Fla. 1st DCA 1977).

191. Coastal's permit application in the instant case is no different. Indeed, the above-referenced legal principles are acknowledged in DEP's requirement that the following language to be included when publishing DEP's Notice of Intent

> If a petition is filed, the administrative hearing process is designed to formulate agency action. Accordingly, the Department's final action may be different from the position taken by it in this Notice.

(Rule 62-103.150(2)(d), Florida Administrative Code.)

192. The amount of surety required under Chapter 97-49, Laws of Florida, based upon a recommendation of the DEP, must reflect two separate cost components: projected natural resource damages and projected cleanup costs, both of which result from a maximum oil spill and adverse hydrologic and atmospheric conditions that would tend to transport oil into environmentally sensitive areas.

193. DEP's decision to use the natural resource damage compensation schedule set forth in Section 376.121, Florida Statutes, in computing the projected natural resource damages under Chapter 97-49, Laws of Florida, was reasonable. Section 377.2425, Florida Statutes, does not contain instructions for determining "natural resource damages." By contrast, Section 376.121, Florida Statutes, sets forth a detailed method by which to calculate damages resulting from the discharge of a pollutant:

> 376.121 Liability for damage to natural resources.–
>
> . . .
>
> To ensure that the public does not bear a substantial loss as a result of the destruction of natural resources, the procedures set out in this section shall be used to assess the cost of damages to such resources. Natural resources shall include coastal waters, wetlands, estuaries, tidal flats, beaches, lands adjoining the seacoasts of the state, and all living things except human beings. The legislature recognizes the difficulty historically encountered in calculating the value of damaged natural resources. The value of certain qualities of the state's natural resources is not readily quantifiable, yet the resources and their qualities have an intrinsic value to the residents of the state, and any damages to natural resources and their qualities should not be dismissed merely because of the difficulty in quantifying their value. In order to avoid unnecessary speculation and expenditure of limited resources to determine these values, the Legislature hereby establishes a schedule for compensation for damage to the state's natural resources and the quality of said resources.

(1) The department shall assess and recover from responsible parties the compensation for the injury or destruction of natural resources, including, but not limited to, the death or injury of living things and damage to or destruction of habitat, resulting from pollutant discharges prohibited by s. 376.041. The amount of compensation and any costs of assessing damage and recovering compensation received by the department shall be deposited into the Florida Coastal Protection Trust Fund pursuant to s. 376.12 and disbursed according to subsection (11). Whoever violates, or causes to be violated, s. 376.041 shall be liable to the state for damage to natural resources.

(2) The compensation schedule for damage to natural resources is based upon the cost of restoration and the loss of ecological, consumptive, intrinsic, recreational, scientific, economic, aesthetic, and educational values of such injured or destroyed resources. The compensation schedule takes into account:

(a) The volume of the discharge.

(b) The characteristics of the pollutant discharged. The toxicity, dispersibility, solubility, and persistence characteristics of a pollutant as affects the severity of the effects on the receiving environment, living things, and recreational and aesthetic resources. Pollutants have varying propensities to injure natural resources based upon their potential exposure and effects. Exposure to natural resources is determined by the dispersibility and degradability of the pollutant. Effects to natural resources result from mechanical injury and toxicity and include physical contamination, smothering, feeding prevention, immobilization, respiratory

distress, direct mortality, lost recruitment of larvae and juveniles killed, changes in the food web, and chronic effects of sublethal levels of contaminates in tissues or the environment. For purposes of the compensation schedule, pollutants have been ranked for their propensity to cause injury to natural resources based upon a combination of their acute toxicity, mechanical injury, degradability, and dispersibility characteristics on a 1-to-3 relative scale with Category 1 containing the pollutants with the greatest propensity to cause injury to natural resources. The following pollutants are categorized:

1. Category 1: bunker and residual fuel.
2. Category 2: waste oils, crude oil, lubricating oil, asphalt, and tars.
3. Category 3: hydraulic fluids, numbers 1 and 2 diesel fuels, heating oil, jet aviation fuels, motor gasoline, including aviation gasoline, kerosene, stationary turbine fuels, ammonia and its derivatives, and chlorine and its derivatives.

The department shall adopt rules establishing the pollutant category of pesticides and other pollutants as defined in s. 376.031 and not listed in this paragraph.

(c) The type and sensitivity of natural resources affected by a discharge, determined by the following factors:

1. The location of a discharge. Inshore discharges are discharges that occur within waters under the jurisdiction of the department and within an area extending seaward from the coastline of the state to a point 1 statute mile seaward of the coastline. Nearshore discharges are discharges that occur more than 1 statute mile, but within 3 statute miles, seaward of the coastline. Offshore discharges are

discharges that occur more than 3 statute miles seaward of the coastline.

2. The location of the discharge with respect to special management areas designated because of their unique habitats; living resources; recreational use; aesthetic importance; and other ecological, educational, consumptive, intrinsic, scientific, and economic values of the natural resources located therein. Special management areas are state parks; recreation areas; national parks, seashores, estuarine research reserves, marine sanctuaries, wildlife refuges, and national estuary program water bodies; state aquatic preserves and reserves; classified shellfish harvesting areas; areas of critical state concern; federally designated critical habitat for endangered or threatened species; and outstanding Florida waters.

3. The areal or linear extent of the natural resources impacted.

(3) Compensation for damage to natural resources for any discharge of less than 25 gallons of gasoline or diesel fuel shall be $50.

(4) Compensation schedule:

(a) The amount of compensation assessed under this schedule is calculated by: multiplying $1 per gallon or its equivalent measurement of pollutant discharged, by the number of gallons or its equivalent measurement, times the location of the discharge factor, times the special management area factor.

(b) Added to the amount obtained in paragraph (a) is the value of the observable natural resources damaged, which is calculated by multiplying the areal or linear coverage of impacted habitat by the

corresponding habitat factor, times the special management area factor.

(c) The sum of paragraphs (a) and (b) is then multiplied by the pollutant category factor.

(d) The final damage assessment figure is the sum of the amount calculated in paragraph (c) plus the compensation for death of endangered or threatened species, plus the cost of conducting the damage assessment as determined by the department.

(5)(a) The factors used in calculating the damage assessment are:

1. Location of discharge factor:

a. Discharges that originate inshore have a factor of eight. Discharges that originate nearshore have a factor of five. Discharges that originate offshore have a factor of one.

b. Compensation for damage to natural resources resulting from discharges that originate outside of state waters but that traverse the state's boundaries and therefore have an impact upon the state's natural resources shall be calculated using a location factor of one.

c. Compensation for damage to natural resources resulting from discharges of less than 10,000 gallons of pollutants which originate within 100 yards of an established terminal facility or point of routine pollutant transfer in a designated port authority as defined in s. 315.02 shall be assessed a location factor of one.

2. Special management area factor: Discharges that originate in special management areas described in subparagraph (2)(c)2. have a factor of two. Discharges that originate outside a special management area described in subparagraph (2)(c)2. have a location factor of one. For discharges that

originate outside of a special management area but impact the natural resources within a special management area, the value of the natural resources damaged within the area shall be multiplied by the special management area factor of two.

3. Pollutant category factor: Discharges of category 1 pollutants have a factor of eight. Discharges of category 2 pollutants have a factor of four. Discharges of category 3 pollutants have a factor of one.

4. Habitat factor: The amount of compensation for damage to the natural resources of the state is established as follows:

a. $10 per square foot of coral reef impacted.

b. $1 per square foot of mangrove or seagrass impacted.

c. $1 per linear foot of sandy beach impacted.

d. $0.50 per square foot of live bottom, oyster reefs, worm rock, perennial algae, saltmarsh, or freshwater tidal marsh impacted.

e. $0.05 per square foot of sand bottom or mud flats, or combination thereof, impacted.

(b) The areal and linear coverage of habitat impacted shall be determined by the department using a combination of field measurements, aerial photogrammetry, and satellite imagery. An area is impacted when the pollutant comes in contact with the habitat.

(6) It is understood that a pollutant will, by its very nature, result in damage to the flora and fauna of the waters of the state and the adjoining land. Therefore, compensation for such resources, which is difficult to calculate, is included in the compensation schedule. Not included, however, in this base figure is compensation for the death of

> endangered or threatened species directly attributable to the pollutant discharged. Compensation for the death of any animal designated by rule as endangered by the Florida Game and Fresh Water Fish Commission is $10,000. Compensation for the death of any animal designated by rule as threatened by the Florida Game and Fresh Water Fish Commission is $5,000. These amounts are not intended to reflect the actual value of said endangered or threatened species, but are included for the purposes of this section.

(Emphasis added)

194. Section 376.121, Florida Statutes, represents a comprehensive and definitive statement of the legislature on the value of the state's natural resources and, similarly, on how to compute the values of those resources damaged by a discharge of oil in state waters. It is thus appropriate to utilize this tool to compute potential damages as well as actual damages. The process, however is difficult and complicated, as described in the findings of fact above.

195. There are no rules to govern DEP's application of the dictates of Chapter 97-49; there are no definitions of the terms "maximum oil spill" and "adverse hydrographic and atmospheric conditions." Those terms are tempered by the overriding requirement that the surety be reasonable.

196. DEP's selection of the Ixtoc I oil spill as a "maximum" volume to apply to the compensation formula was not reasonable. Pressed for time in trying to apply Chapter 97-49 to a pending permit request, DEP selected a "bird in hand," a spill which occurred in foreign waters,

under less stringent regulatory restrictions, and under control of the Mexican government. But Ixtoc I happened, and as the largest spill in history, it was plainly The maximum.

197. Had the legislature intended this short-cut process, it well could have dictated its own maximum spill or a flat-rate surety amount. But it is absurd to consider that the "maximum" spill intended is anything but a maximum spill from the site at issue. The greater weight and more competent substantial evidence in this proceeding established that Coastal's "worst case" scenario, rather than DEP's 150 million gallons, is a "reasonable maximum."

198. At the direction of DEP, Coastal developed a careful, well-founded oil-spill trajectory analysis which contributed to proper applications of Chapter 97-49 and the compensation formula of Section 376.121, Florida Statutes. The analysis led to a series of different scenarios, one of which was found above to be best supported by the evidence.

199. In completing the spill trajectory, Coastal's expert calculated a spill boundary that was close to the same boundary derived by DEP from a thumbnail guess. The difference between the two results was that Coastal appropriately considered the characteristic of the oil to be released and determined that its toxicity would be diffused long before it reached the distant habitat.

200. Cleanup costs projected by Coastal are based on the results of the trajectory analysis and the extensive experience of its expert in working with regulatory agencies on oil spills throughout the world. DEP's short-hand method of extrapolating costs based on another wholly-

unrelated event, the Tampa Bay oil spill, was fatally flawed for the reasons described in the findings of fact above.

201. Under certain specified circumstances, Section 376.12, Florida Statutes, provides a $150,000,000 limitation of liability for cleanup costs for a facility responsible for a pollutant discharge. The maximum cleanup cost derived from Dr. Michel's study described above, is below this statutory limit and it is unnecessary to address its relevance.

202. Finally, there are certain considerations urged by Coastal that simply have no basis in the criteria for permit or in the surety calculation. Although a reliable source of petroleum from Florida's coastal waters would have some positive economic impacts, nothing in the relevant statutes permits that as a set-off of the surety amount. Nor do the statutes contemplate consideration of any environmental advantage of avoiding risky and statistically more damaging barge and tanker traffic.

RECOMMENDATION

It is hereby

RECOMMENDED: That a final order be entered by the Department of Environmental Protection granting Permit no. 1281, with the conditions described in paragraphs 74 and 75 and a surety to be established by Final Order of the Administration Commission in the recommended amount of $224,488,571.

DONE AND ENTERED this 8th day of April, 1998, in Tallahassee, Leon County, Florida.

/s/ Mary Clark
MARY CLARK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847

Filed with the Clerk of the Division of Administrative Hearings this 8th day of April, 1998.

ENDNOTES

[1] During the hearing, certain exhibits were taken under advisement (Coastal's Exhibits no. 248, 335, and 355-358) and, they are now received in evidence. These are oil spill statistical reports maintained by the U.S. Department of Interior, Mineral Management Service (MMS) and by Cutter Information Corporation. Dr. Dagmar Etkin testified at length on the methodology her company (Cutter) uses to obtain and maintain the data. Experts, including those who participated in this hearing, rely on the governmental agency's publications and on Cutters's. The documents are admissible as hearsay exceptions, as provided in Section 90.803(17), Florida Statutes. In this case, the publications were helpful in comparing types, rough approximate amounts, and locations of oil spills.

[2] At least 2 wells in the Jay field achieved a flow rate of approximately 7000 barrels per day during the production stage and after multiple applications of hydrochloric acid to stimulate the flow. This flow rate does not approximate a reasonable natural flow during a blowout.

COPIES FURNISHED:

David Guest, Esquire
S. Ansley Samson, Esquire

Mark MacDonald, Esquire
Post Office Box 1329
Tallahassee, Florida 32302-1329
Sierra Club Legal Defense Fund

Andrew J. Baumann, Esquire
John W. Costigan, Esquire
F. Perry Odom, General Counsel
Department of Environmental Protection
Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Robert J. Angerer, Esquire
Robert J. Angerer, Jr., Esquire
Angerer and Angerer
Post Office Box 10468
Tallahassee, Florida 32302
Coastal Petroleum Company

John K. Aurell, Esquire
Ausley and McMullen
Post Office Box 391
Tallahassee, Florida 32302
Coastal Petroleum Company

Susan W. Fox, Esquire
MacFarlane Ferguson and McMullen
Post Office Box 1531
Tampa, Florida 33601-1531
Coastal Petroleum Company

Frank Latham, Vice-President
St. George Island Civic Club
Post Office Box 157

Apalachicola, Florida 32320
St. George Island Civic Club

Denis Dean, Esquire
Jonathan Glogau, Esquire
Monica Reimer, Esquire
Department of Legal Affairs
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

Robert A. Butterworth
Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

Michael Takac, Esquire
Governor's Legal Office
Office of the Governor
The Capitol, Room 209
Tallahassee, Florida 32399-0001

Kathy Carter, Agency Clerk
Department of Environmental Protection
Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Perry Odom, General Counsel
Department of Environmental Protection
Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order must be filed with the agency that will issue the Final Order in this case.

Supreme Court, U.S.
FILED
MAY 27 1998
OFFICE OF THE CLERK

(3)

No. 97-1760

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

COASTAL PETROLEUM COMPANY,
Petitioner,

vs.

Hon. LAWTON CHILES, et al., as and constituting the Board of Trustees of the Internal Improvement Trust Fund, and as constituting the Executive Board of the Department of Natural Resources of the State of Florida,
Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal, First District of Florida

---

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ROBERT A. BUTTERWORTH
Attorney General of Florida

JONATHAN A. GLOGAU*
CHARLES R. MCCOY
Assistant Attorneys General
**Counsel of Record for Respondents*

OFFICE OF THE ATTORNEY GENERAL
The Capitol, PL-01
Tallahassee, FL 32399-1050

24 pp

QUESTIONS PRESENTED

[as framed by Petitioner]

1. Does the Takings Clause of the Fifth Amendment to the Unites States Constitution protect petitioner's long-term oil and gas royalty on sovereignty submerged lands from outright confiscation by Florida?

2. Whether Florida impairs its own contractual obligations in violation of Art. 1, §10 of the United States Constitution by refusing to enter into leases on sovereignty lands thereby rendering petitioner's royalty worthless?

3. Does Dolan v. City of Tigard, 512 U.S. 374 (1994), require Florida to establish "rough proportionality" between its absolute restriction on drilling for oil and gas, and the environmental perils it seeks to avert?

4. Has Florida denied petitioner its royalty without the due process of law required under the Fourteenth Amendment to the Constitution when it declared petitioner's royalty "speculative" and therefore worthless, without allowing petitioner a fair opportunity to introduce evidence of value?

Respondents will argue that none of the questions are fairly presented, as all assume Petitioner's royalty is indeed property under state law--a matter the decisions below resolved against Petitioner. Also, Petitioner's third question was not raised or ruled upon below, and is not preserved for review.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 6

A. The Decision Below Is Highly Factual; And Turns On A Question of State Law Only, That Coastal's Royalty Interest Is Not "Property" .. 6

B. Prudential Concerns Weigh Strongly Against Certiorari Review 11

C. The Remaining Questions Suggested By Coastal Are Not Fairly Presented .. 15

1. Impairment of Contract 15

2. Conflict with Dolan's "Rough Proportionality" Test 16

3. Opportunity to Present Evidence of Value 17

CONCLUSION 18

TABLE OF AUTHORITIES

Cases **Page(s)**

Federal

Barnhill v. Johnson, 503 U.S. 393 (1992) 7

Brady v. Maryland, 83 S. Ct. 1194 (1963) 11

Coastal Petroleum Co., v. International Minerals Corp., 709 F.Supp. 1092 (N.D. Fla. 1988) 2

Coastal Petroleum Co. v. Sec. of the Army, case nos. 68-951-Civ-CA & 69-699-Civ-CA [unpublished] (S.D. Fla. Feb. 5, 1971) 9

Dolan v. City of Tigard, 512 U.S. 374 (1994) i,16

Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892) ... 8

Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) 9,10

Marine One, Inc. v. Manatee County, 898 F.2d 1490 (11th Cir. 1990) 17

Olson v. U.S., 292 U.S. 246 (1934) 14

Ruckelshaus v. Monsanto, 467 U.S. 986 (1984) 7,15

United States v. Johnson, 268 U.S. 220 (1925) 11

State

Broward v. Mabry, 58 Fla. 298, 50 So. 826 (1909) 8

Coastal Petroleum Co. v. American Cyanamid Co.,
492 So. 2d 339 (Fla. 1986) 8

Conway Land, Inc. v. Terry, 542 So. 2d 362 (Fla. 1989) 10,11

Graham v. Estuary Properties, Inc., 399 So. 2d 1374
(Fla. 1981), *cert. denied*, 454 U.S. 1083 (1981) 14

Neel v. Rudman, 33 So. 2d 234 (Fla. 1948) 7

State v. Black River Phosphate Co., 32 Fla. 82,
13 So. 640 (1893) 8

State v. Gerbing, 56 Fla. 603, 47 So. 353 (1908) 8

Welles v. Berry, 434 So. 2d 962 (Fla. 2d DCA 1983) .. 8,15

Other Authority

28 U.S.C. §1257(a) 2,11

Art. X, §11, Fla. Const. 8

§253.52, Fla. Stat.. 15

ch. 90-72, Laws of Fla.. 3,5

Stern & Gressman, Supreme Court Practice (7th ed. 1993) 11

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

No. 97-1760

COASTAL PETROLEUM COMPANY,
Petitioner,

vs.

Hon. LAWTON CHILES, et al., as and constituting the Board of Trustees of the Internal Improvement Trust Fund, and as constituting the Executive Board of the Department of Natural Resources of the State of Florida,
Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal, First District of Florida

---

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion by the First District Court of Appeal (Pet. App. 1-12) is reported at 701 So.2d 619. The opinion of the trial court (Pet. App. 13-33) is not reported.

JURISDICTION

The decision below was a final decision by the First District Court of Appeal of Florida on November 5, 1997. The Florida Supreme Court declined discretionary review on January 28, 1998. The petition for writ of certiorari was docketed on April 28, 1998. Petitioner has invoked this Court's jurisdiction under 28 U.S.C. §1257(a).

Respondents will urge the decision below was tantamount to a determination that Coastal's royalty interest was not "property" under Florida law. By petitioning for certiorari, Coastal seeks reversal on the underlying issue of state law only. This Court does not have jurisdiction to do so.

STATEMENT OF THE CASE

This case addresses a matter of state law; that is, whether a residual royalty interest in sovereign land--given the unusual facts of this case--is a property interest under Florida law. Essentially, Coastal seeks certiorari to reverse a decision of state law that no property interest arose, in order to press its federal claim that a 1990 statute effected a taking of its royalty interest.

In 1941, Coastal's corporate predecessor leased a tremendous swathe of land under Florida's Gulf waters. In 1976, Coastal entered an agreement settling litigation with Respondents ("Florida" or the "State"), and relinquishing all but a royalty interest in the nearshore portion of that land.[1] Coastal Petroleum

---

[1]The map on page 55 of Coastal's appendix is helpful. It shows that after the 1976 settlement Coastal's lease was reduced to two parallel bands of land under the Gulf of Mexico. Each band is about 3 nautical miles wide, roughly following the coastline, from Naples to Apalachicola. The more landward band (aqua on the map) is subject to Coastal's residual interest. For clarity, this band will be referred as the "royalty area." It is the only area at issue in this litigation.

Co., v. International Minerals Corp., 709 F.Supp. 1092, 1098 n.3 (N.D. Fla. 1988) By statute, the 1990 Legislature banned future oil and gas drilling throughout Florida's Gulf waters, not just near the shore. Ch. 90-72, Laws of Florida (1990), codified as §253.61(1)(d) & §377.24(9), Florida Statutes (prohibiting oil and gas leases and permits for most of Florida's territorial waters in the Gulf and Atlantic).

Coastal's statement omits highly factual conclusions reached by the state courts. The trial court found that from 1947 to 1968 twenty-two offshore wells were drilled, only one of which--not in the royalty or offshore areas--discovered any oil or gas. There were no third-party requests for leases in the royalty area during the 15 years between the settlement and the instant litigation. (Pet. App., p. 3, 14-16) These facts compelled the conclusion the royalty area was not "prospective" for oil and gas in 1976, when Coastal relinquished all but its royalty interest back to the Trustees pursuant to the settlement agreement. (Pet. App. p. 5, 16)

The trial court found the 1976 agreement was silent as to whether the State was to cooperate with potential future lessees, and contained no provision requiring the royalty area to be leased at all. (Pet. App., p. 16) The court also found, based on Florida law, that the settlement agreement did not imply a condition that the State would lease land within the royalty area. It concluded that the settlement agreement did not give Coastal any right to require the royalty area be leased to others. Therefore, Coastal's royalty interest was "only a conditional right to profits that might be derived form oil production in the future." (Pet. App., p. 18)

The most seaward band (dark blue on map) is subject to Coastal's right to actively explore for oil and extract any commercial quantities found. The two bands are separated by a third band (white on map), in which Coastal relinquished all its interests.

Section 3, part 1.(D) of the settlement provided:

> Coastal shall have no right to intervene in any land use decisions within the areas leased other than as to the outermost three miles retained by Coastal. Coastal's only rights ... shall be the specified residual royalty on oil, gas, and other minerals. [e.s.]

See "Memorandum of Settlement" at §3, par. 1.(D) [Pet. App., p. 50].

This language covers any land use decisions, not just those made by the titleholder of the royalty area; that is, the Board of Trustees of the Internal Improvement Trust Fund. The trial court held that under §3, part 1.(D), Coastal "surrendered its rights to the Trustees," including any right as to granting new leases--a land use decision. (Pet. App., p. 20-21) Therefore, the court concluded the royalty interest was "not a 'right' that was taken by the laws prohibiting exploration and production of oil in the nearshore [royalty] area." (Pet. App., p. 21) Later, the court added:

> Under these circumstances, Coastal's reservation of the royalty interest not only failed to create a duty on the part of the State to lease, but failed to contain any reasonable expectation that the State would lease in the future.
>
> * * *
>
> Recovery of any profits form the reserved royalty interest would be purely speculative. In fact, there were many obstacles to a potential recovery of profits even before the 1990 legislation .... Coastal's opportunity to recover a profit from oil produced in the nearshore area depends [on] a

> series of possibilities, one stacked on another.
>
> * * *
>
> A more practical interpretation leads the court to conclude that no property right was taken and that no compensation can be due.

(Pet. App., p. 25-33)

The First District Court of Appeal agreed:

> We concur in the sound reasoning of the trial court in determining that [B]ecause of Coastal's lack of a reasonable expectation that the State would lease and its lack of ability to force the State to lease, the State's action in protecting its' [sic] sovereign submerged land by preventing exploration and drilling does not constitute a compensable taking of Coastal's reserved property interest.

(Pet. App., p. 2) In reaching this conclusion, the First DCA repeated several of the trial court's conclusions as to the royalty area's prospects for containing commercial quantities of oil. It then held Coastal's royalty interest did not rise to a "protectable property interest under the law of inverse condemnation." (Pet. App., p. 11)

This is the context in which Coastal contends ch. 90-72, Laws of Florida (Pet. App., p.56-9) effected a taking. That law, a land use decision by the Florida Legislature, prohibited oil and gas leasing in Florida's Gulf waters. It did, however, except leases entered before its effective date; thereby not affecting Coastal's active exploration and production rights in the outermost portion of the original leasehold. Coastal seeks compensation for the alleged taking through the statutory prohibition against leasing

the royalty area to others for oil and gas drilling.

REASONS FOR DENYING THE WRIT

A. THE DECISION BELOW IS HIGHLY FACTUAL AND TURNS ON A QUESTION OF STATE LAW ONLY, THAT COASTAL'S ROYALTY INTEREST IS NOT PROPERTY

Coastal's petition fails to show why granting certiorari would be appropriate under Rule 10(c). Under that rule, this Court may grant review when a state court decides an important question of federal law which has not been settled by this Court, but should be; or has decided a federal question in a way conflicting with relevant decisions of this Court.

The petition is deficient under either alternative in 10(c). The opinions of the state trial and appellate courts rest on extensive and unusual facts, and upon a decision of state law only; that the particular interest allegedly taken was not "property" under Florida law. Alternatively, the opinions rest on the highly factual conclusion that the royalty area was not "prospective" for oil and gas, so that Coastal's expectation of a return on the royalty was not reasonable; and thus did not rise to a property interest which was protected.

Coastal concedes the state law nature of this crucial issue, advancing the generality that "a royalty is a protected interest in real property under Florida law." [e.s.] (pet., p. 7-8) This unremarkable observation has nothing to do with the

determination here, that the particular royalty[2] at issue was not "property"; or, if legally property, is factually so speculative that it is not a reasonable investment backed expectation protected by the Takings Clause.

Property interests arise under state law, not the U.S. Constitution. Ruckelshaus v. Monsanto, 467 U.S. 986, 1001 (1984) ("[p]roperty interests ... are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." [internal quotation omitted]). *See also* Barnhill v. Johnson, 503 U.S. 393, 398, 112 S.Ct. 1386, 1389, 118 L.Ed.2d 39 (1992) ("In the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law"). Under the unusual facts of this case, the decisions of the state courts must be read as a determination that Coastal's particular interest was not property under Florida law; or, if property, not an interest protected by the U.S. Constitution.

The royalty area is sovereignty submerged land of the Gulf of Mexico. As a matter of Florida law, it has long been subject to the public trust doctrine:

> The title to swamp and overflowed lands which Florida received in the 1850s and thereafter was vested in the Board of Trustees for the Internal Improvement Fund of Florida by the legislature. The title to sovereignty lands at this point remained in the legislature as a public trust.

---

[2]Florida has long recognized that a royalty interest in minerals is different from the mineral interest itself. *See* Neel v. Rudman, 33 So.2d 234, 237 (Fla. 1948) (en banc) ("a conveyance of a royalty interest and the conveyance of minerals in place are two entirely different documents and convey entirely different interests").

> Illinois Central Railroad v. Illinois, 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (1892); Broward v. Mabry, 58 Fla. 298, 50 So. 826 (1909); State v. Black River Phosphate Co., 32 Fla. 82, 13 So. 640 (1893). These lands differ from other state lands. Sovereignty lands are for public use, "not for the purpose of sale or conversion into other values, or reduction into several or individual ownership." State v. Gerbing, 56 Fla. 603, 608, 47 So. 353, 355 (1908).

Coastal Petroleum Co. v. American Cyanamid Co. 492 So.2d 339, 342 (Fla. 1986). *See also*, Art. X, §11, Fla. Const. (1970 amendment which declares sovereign lands held in trust for all the people).

As the case law discussed in American Cyanamid observes, the public trust doctrine long preceded the 1941 lease to Coastal's predecessor; the leasehold as acquired by Coastal in 1947; and the 1976 settlement agreement. The 1990 law prohibiting offshore drilling was but a legislative exercise of the duty imposed by that doctrine. It was an exercise of proprietary, not regulatory, power. Both courts recognized this. Therefore, Welles v. Berry, 434 So.2d 982 (Fla. 2d DCA 1983), did not create an implied duty in the State to lease the royalty area to others. Subject to the public trust doctrine, the State was not obligated to seek the maximum economic return from sovereign land. This, too, is a matter of state law only. (*See* Pet. App., p. 8-10, 18-26.)

The 1990 law simply made explicit what the public trust doctrine had long implied--that the use of sovereign, submerged land was restricted in ways not applicable to private land, and private use of sovereign land must yield to the best interest of the public as a whole. Consequently, the public trust doctrine, as

manifested in the 1990 law, was an existing rule or understanding--it was an implied condition or reservation in the leases from their inception in 1941.[3] With respect to Coastal's leases, the doctrine was, an implied reservation Application or exercise of the doctrine does not require just compensation under the Takings Clause. *See* Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 2901 (1992):

> In light of our traditional resort to "existing rules or understandings that stem from an independent source such as state law" to define the range of interests that qualify for protection as "property" under the Fifth and Fourteenth Amendments ... this recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those "existing rules or understandings" is surely unexceptional. When, however, a regulation that declares "off-limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it. [citations omitted]

The public trust doctrine is an existing rule or understanding which was found, in litigation involving Coastal and the State,

---

[3]*See* Coastal Petroleum Co. v. Sec. of the Army, case nos. 68-951-Civ-CA & 69-699-Civ-CA [unpublished] (S.D. Fla. Feb. 5, 1971) ("The relationship of the Trustees to Coastal is not as tenants in common or joint tenants but rather as grantor and grantee with the grantor holding a reservation clause. The reservation clause, of course, is the trust doctrine mentioned in footnote 1 above."). [Note: these consolidated cases are in the record below at Plaintiff's Ex. 1, R 4616-24.].

to be a specific reservation in favor of the State in the leases. Exercise of the duty, imposed by the public trust doctrine, to protect sovereignty submerged land cannot be the basis of Coastal's taking claim.[4]

The courts below found Coastal had no contractual right, founded upon the 1976 settlement, to require Florida to pursue other leases in the royalty area. Those courts also found, as a matter of fact, the royalty area had no prospect of containing oil in commercial quantities. They found, as a matter of fact and state law, Coastal had no right to require or even expect that the royalty area be leased to anyone in the future. They held Coastal's interest was not "property" under Florida law; or, if property, was not a protected interest since Coastal had no reasonable expectation of a return on the royalty. Thus, the factual and state-law character of the decisions is paramount.

Coastal correctly cites to Conway Land, Inc. v. Terry, 542 So.2d 362 (Fla. 1989) for the general proposition that a perpetual, non-participatory royalty interest in oil and gas is an interest in real property. Of course, Coastal fails to mention that its interest arises through a lease of sovereign land always subject to the public trust doctrine; its lease was voluntarily amended through the 1976 settlement agreement to relinquish, in the nearshore area, all but the passive royalty interest; the royalty interest was not perpetual, but limited to 40 years; and that evidence adduced at trial showed the nearshore area was not prospective for commercial quantities of oil, thereby raising no reasonable expectation of future leasing. None of this was

---

[4]Coastal's reliance on Lucas is also unavailing because the 1990 law did not restrict all economically productive or beneficial uses of the royalty. To the extent there was value there, Coastal retains that value through the possibility of recovery of oil by slant drilling into the royalty area. (Pet. App., p. 28-9)

present in Conway.

Consequently, the petition for certiorari unavoidably seeks review of fact and state-law[5] questions already resolved adversely to Coastal. This Court lacks jurisdiction. *See* 28 U.S.C. §1257 (establishing certiorari jurisdiction to review decisions by the highest state court in which a decision could be had, when a state statute is questioned as being repugnant to the Constitution, etc.; but not establishing jurisdiction to entertain questions of state law only).

B. PRUDENTIAL CONCERNS WEIGH STRONGLY AGAINST CERTIORARI REVIEW

Two courts have concurred in this highly fact-specific case, that Coastal had no protected property interest in the royalty area. Such concurrence turns upon the proven lack of oil and gas in the royalty area, and upon interpretation of the 1976 settlement agreement--a separate contract from the original lease.

In the 1976 agreement, Coastal voluntarily relinquished all rights but the passive royalty in the nearshore area. Coastal also agreed not to intervene in state land use decisions, such as the 1990 Florida law which Coastal now contends effected the taking. Certiorari is highly inappropriate. *See* United States v. Johnson, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari [petition] to review evidence and discuss specific facts."). *See also* Stern & Gressman, Supreme Court Practice (7th ed. 1993)

---

[5]This Court is bound by the Florida courts' interpretation of state law. Brady v. Maryland, 83 S.Ct. 1194, 1198 (1963) ("We usually walk on treacherous ground when we explore state law, for state courts, state agencies, and state legislatures are its final expositors under our federal regime." [footnote omitted]).

§4.14 ("The Supreme Court will usually deny certiorari when review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved, or upon the construction of particular contracts or written instruments.").

These highly unusual facts would make this case readily distinguishable as a precedent. Again, certiorari review is not justified.

In addition to sharing the flaw of Part A, Part B of Coastal's petition (p. 8-9) exhibits flaws of its own. Part B again assumes the royalty interest is "property." It also assumes a compensable taking must be found, when the factual record shows the royalty interest--if assumed to be property under Florida law--has such speculative value that Coastal's expectation of a monetary return is not reasonable.[6]

This is where Coastal tries to bootstrap itself into a federal question. It assumes that evidence of the dollar value of the royalty goes only to valuation of taken property. It fails to comprehend that the inability to show any reasonably measurable value also goes to whether the expectation of receiving a royalty payment is "property"; and, if so, whether such property is protected by the Takings Clause. Nothing in this Court's jurisprudence makes the Takings Clause an insurance policy to

---

[6]In its second footnote, Coastal faults the State for urging there is no oil to be found in the royalty area, while simultaneously requiring a bond of up to $4.25 billion for clean up costs of a hypothetical million barrel [oil] spill. Coastal fails to inform this Court that the subject bond was for a proposed exploratory well nine miles into the Gulf (Pet. App., p. 73 at par. 8); that is, far outside the royalty area, which extends only 4.36 miles into the Gulf. (Pet. App., p. 4, 15) There is no evidence that any commercial oil deposits 9 miles offshore would also lie within the royalty area.

preserve the speculator's dreams of riches against proper governmental action.

Coastal would evade its erroneous assumptions by baldly asserting the 1990 law deprived it of the only "viable" economic use of its property. Viability is not the issue; reasonableness is. Coastal never asks whether its royalty interest is an investment backed-expectation that is reasonable. Recall the lucid observations by the trial court:

> Recovery of any profits from the reserved royalty interest would be purely speculative. In fact, there were many obstacles to a potential recovery of profits even before the 1990 legislation. First, there would have to be an operator willing to advance the coasts of exploring for oil in the nearshore area. Second, the operator would have to reach a reasonable agreement to lease the land from the state. Third, it would have to be economically feasable [sic] for the operator to produce the oil without violating land regulations in existence at the time of the lease. Fourth the operator would have to actually strike oil. . . . Furthermore, the fact that there has been no oil produced in the nearshore area at any time during the history of Coastal's relationship with the Trustees is another good indicator that Coastal had no reasonable expectation of obtaining a profit from the royalty interest.

(Pet. App., p. 31)

As a matter of fact, the royalty interest had no economic value which Coastal could reasonably expect to realize. None of the cases cited by it stand for the proposition that the government

must pay just compensation anytime it takes property constituting an unreasonable economic expectation. *See* Olson v. U.S., 292 U.S. 246, 257 (1934):

> Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable should be excluded from consideration for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value ....

The logic of this observation is not limited to the valuation of taken property. It is equally applicable to the determination of whether an economic expectation rises to a protected property interest.

Coastal is no different from the landowner who unsuccessfully challenged development restrictions in Graham v. Estuary Properties, Inc., 399 So.2d 1374, 1383 (Fla. 1981), *cert. denied*, 454 U.S. 1083 (1981) ("Estuary, on the other hand, had only its own subjective expectation that the land could be developed in the manner it now proposes."). Coastal maintained only a subjective expectation that it might, some day, receive a royalty if someone discovered and produced commercial quantities of oil in the royalty area. However, based on the trial court's factual findings--most prominently that the royalty area was not prospective for oil and gas when the 1976 settlement was reached--Coastal's subjective expectation was not reasonable. The Takings Clause simply does not protect Coastal's unreasonable expectation against later exercise of the government's proprietary right to control the use of sovereign land.

The instant petition wrongly assumes Coastal's royalty interest is property under Florida law. It then raises an abstract, almost rhetorical question: If the government takes property shown to create only an unreasonable expectation of monetary return, has the government taken property for which the U.S. Constitution requires just compensation? The question answers itself, and the answer is "no."

C. THE REMAINING QUESTIONS SUGGESTED BY COASTAL ARE NOT FAIRLY PRESENTED

1. Impairment of Contract [Coastal's second question]

Both state courts found there was no contractual or statutory obligation upon Florida to lease the royalty area for oil and gas drilling. (Pet. App., p. 7-10, 19-21) The discussion by both courts focused on the meaning of §253.52, Florida Statutes; the meaning of §3, part 1.(D) of the 1976 settlement agreement; and the applicability of Welles v. Berry, 434 So.2d 962 (Fla. 2d DCA 1983). All three items are matters of fact and state law only. In its impairment of contract argument, Coastal simply asks this Court to re-weigh the evidence, and to re-interpret state law. (*See* pet. at p. 10-12, arguing that the state courts erred as a matter of Florida law.)

For the purpose of a taking under the U.S. Constitution, "property" must be created by an independent source. Ruckelshaus v. Monsanto. Coastal's unavoidable problem is that under the 1976 settlement, it had no right to compel Florida to lease the royalty area at all. As interpreted by the state courts, §253.52, Florida Statutes, did not require the State to lease the royalty area and did not imply a contractual right between Coastal and the State. Therefore, Coastal had no express or implied contractual right which could be impaired by the 1990

law. Its impairment of contract claim has no factual or legal basis justifying review.

2. Conflict with *Dolan's* "Rough Proportionality" Test [Coastal's third question]

Parsing Dolan v. City of Tigard, 512 U.S. 374 (1994), Coastal urges that certiorari should be granted to ascertain whether there is "rough proportionality" between the "ends it [Florida] seeks and the restrictions it imposes" (pet., p. 14). This question is not properly before the Court.

First, Coastal did not raise it the state courts, thereby depriving them of the opportunity to pass upon it. Second, it ignores the profound differences between this case and Dolan.

In Dolan, a landowner was required by the city of Tigard (Oregon) to dedicate part of her land for flood control and traffic improvements in return for approval of a building permit. At no time was the existence of a property interest questioned; at no time was the existence of property value questioned. The city exercised its police power only, and applied that power to control the use of privately owned land.

Here, Coastal voluntarily relinquished all rights in the royalty area beyond the passive royalty itself, as part of a lawsuit settlement. Absolutely nothing required it to do so. It was free to pursue the litigation. Coastal had no property interest, only a distant hope--refuted by experience--that someone, someday might find oil in commercial quantities which could be produced profitably in light of unchallenged environmental regulations. Because Coastal has no right to require or even expect Florida would lease the royalty area in the future, Coastal's hope of a return on the royalty is so speculative that it is not a reasonable expectation.

Unlike Dolan, there was no exaction here. The 1990 law was not just an exercise of the police power. It was an exercise of the right of ownership by the Florida Legislature as trustee of sovereign land. *See* Marine One, Inc. v. Manatee County, 898 F.2d 1490, 1491 (11th Cir. 1990) (holding, under Florida law, revocation of permits for private upland owners to build docks on sovereign, submerged land was not a taking; and rejecting analogy to cases in which a city's application of its zoning laws to owners of private property was determined to constitute a taking). There is no factual support for the analogy to the "rough proportionality" test in Dolan. To the contrary, the analogy is so rough and disproportionate that it is meaningless, and not a basis for certiorari review.

3. Opportunity to Present Evidence of Value [Coastal's fourth question]

Coastal begins its final point by urging the decision below "cannot be supported on the audacious ground that the royalty has been shown to be worthless." (pet., p. 16-17) This point ignores the procedural history of this case.

Originally, the trial court entered summary judgment for the State. (Pet. App., p. 38-45) That judgment was reversed, as material facts were still disputed. Among those facts were the "expectation of the parties at the time [of] the settlement." (Pet. App., p. 37)

Upon remand to the trial court, Coastal had ample opportunity to adduce competent evidence[7] of the value of the

---

[7]Coastal urges it is useful to mention some of the evidence of value it "could" introduce. (pet. , p. 18-19) Such evidence appears either inadmissible or incompetent. Some of it is self-serving reliance on reports by the "Oil & Gas Journal" about Coastal's beliefs. The rest

residual interest in the royalty area--not to show "value" for the sake of proving damages, but to show the royalty interest created a reasonable expectation of return; and thus was a protected property interest. Coastal failed to do so. Instead it adduced expert testimony--which the trial court chose not to believe--that the royalty area was indeed prospective for oil and gas at the time of the settlement. In contrast, the State proved, through evidence of the absence of third-party lease requests and the historic failure of all drilling on the leases, that the royalty area was not prospective. Therefore, Coastal's residual royalty did not create a reasonable expectation of return, and was not protected by the U.S. Constitution.

Coastal simply failed to adduce persuasive evidence of value, as part of its effort to show the royalty, under the 1976 settlement agreement, created a reasonable expectation of return; thereby becoming a protected property interest. Coastal's fourth question is no more than an attempt to undo its earlier failure.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

JONATHAN A. GLOGAU*
CHARLES R. MCCOY
Assistant Attorneys General

---

has to do with purchase of leases by the U.S. government, for land far removed from the royalty area.

*Counsel of Record for Respondents

Office of the Attorney General
The Capitol, Suite PL-01
Tallahassee, FL 32399-1050
(850) 414-3300

May 27, 1998

Supreme Court, U.S.
FILED
JUN 12 1998
CLERK

(A)

No. 97-1760

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

Coastal Petroleum Company,

Petitioner,

v.

Honorable Lawton Chiles, et al., as and Constituting the Board of Trustees of the Internal Improvement Trust Fund, and as and constituting the Executive Board of the Department of Natural Resources of the State of Florida,

Respondents.

Petition for Writ of Certiorari to the District Court of Appeal, First District, State of Florida

---

REPLY BRIEF

RICHARD A. EPSTEIN
1111 East 60th Street
Chicago, Illinois 60637
773-702-9563

SUSAN W. FOX
Macfarlane Ferguson & McMullen
Post Office Box 1531
Tampa, Florida 33601
813-273-4200

ROBERT J. ANGERER*
ROBERT J. ANGERER, JR.
ANGERER & ANGERER
Post Office Box 10468
Tallahassee, Florida 32302
850-576-5982

Attorneys for Petitioner
*Counsel of Record

15 pp

CORPORATE FILER PROVISION

Pursuant to Supreme Court Rule 29.6, Coastal Petroleum Company, as a corporate filer, hereby states that as listed in its Petition for Writ of Certiorari, Coastal Caribbean Oils & Minerals, Ltd. is its parent company.

TABLE OF CONTENTS

Page

Corporate Filer Provision.....i

Table of Authorities.....iii

Reply Argument.....1

I. Florida's View of this Case Effectively Insulates all State Legislation from Judicial Review under the Takings Clause.....1

II. Respondents' Responsive Brief Ignores or Misstates Every Federal Issue in the Case.....2

A. Florida Confuses the Question of the Legal Status of a Royalty Interest with its Valuation in this Particular Case.....3

B. Florida Suppresses Any Reference to the Standard Good Faith Leasing Obligations Binding on it in this Case.....3

C. Florida's Concept of "Property" is Inconsistent With the Takings Clause.....5

D. Florida Wrongly Asserts that Its Public Trust Doctrine Allows It to Nullify This Conveyance on Submerged Lands at Its Own Will.....7

Conclusion.....10

TABLE OF AUTHORITIES

Page

CASES:

Board of Regents of State Colleges v. Roth,
92 S.Ct. 2701 (1972).....6

Coastal Petroleum Co. v. Sec. of Army,
case nos. 68-951-Civ-CA & 69-699-Civ-CA
(S.D. Fla. Feb. 5, 1971).....9

Coastal Petroleum Co. v. Sec. of Army,
536 F.2d 1030 (5th Cir. 1976).....8

Conway Land, Inc. v. Terry,
542 So. 2d 362 (Fla. 1989).....5

Hughes v. Washington,
389 U.S. 290 (1967).....5

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992).....2,7,6

Marine One, Inc. v. Manatee County,
898 F.2d 1490 (11th Cir. 1990).....8

Ruckelshaus v. Monsanto,
467 U.S. 986 (1984).....4,8

Watson v. Holland,
20 So. 2d 388 (Fla. 1945).....8

Welles v. Berry,
434 So. 2d 982 (Fla. 3d DCA 1983).....5

CONSTITUTIONAL PROVISIONS:

Article X, § 11,
Florida Constitution.....6,8

Fifth Amendment,
United States Constitution.....6

Fourteenth Amendment,
United States Constitution.....6

STATUTES:

Chapter 90-72, Laws of Florida (1990).....3,7

TREATISES:

L. Tribe, American Constitution Law (1988).....5

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

Coastal Petroleum Company,

Petitioner,

v.

Honorable Lawton Chiles, et al., as and Constituting the Board of Trustees of the Internal Improvement Trust Fund, and as and constituting the Executive Board of the Department of Natural Resources of the State of Florida,

Respondents.

Petition for Writ of Certiorari to the District Court of Appeal, First District, State of Florida

---

REPLY BRIEF

I. Florida's View of this Case Effectively Insulates all State Legislation from Judicial Review under the Takings Clause. Florida's astonishing Brief in Response to Coastal's Petition for Certiorari is as notable for the key points it omits or misstates as it is for the unsound arguments it advances. Respondents view the entire controversy as simply an ordinary contract dispute governed by state law that raises no broad questions of federal constitutional law. Respondents reach that conclusion by multiple errors. They first misstate

the procedural posture of the case. Next they misstate the effect of the 1976 Memorandum of Settlement between Coastal and Florida. Last they misread the public trust doctrine to make Coastal's royalty interest revocable at the will of the state. If Respondents correctly characterize this case, then the actions of state legislatures are always immune from examination under the Takings Clause of the United States Constitution. Any interest in private property is subject to confiscation through a redefinition and the explicit protection of property rights is read out of the Constitution.

That broad proposition cannot possibly stand. Its most recent refutation is found in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886 (1992), which struck down state land use restrictions on state-created fee simple interests in land because they deprived the land of all viable economic use without showing that the landowner's conduct (the building of an ordinary single-family beachfront home, no less) constituted a common law nuisance. Yet this case in many ways reveals brazen state behavior toward Petitioner's royalty interest which is far more aggressive than the state land use regulation struck down in *Lucas*. In *Lucas* the state regulation at least allowed the landowner to keep possession of his land. But royalty interests are intangible real property, so the refusal to lease wipes out the last scintilla of benefit to Coastal. In this case, Florida claims it has taken nothing when in fact it has left nothing. *Lucas* is not merely a case about land. It is a case about the protection that is given to all holders of private property, including royalties vested under state law.

II. Respondents' Responsive Brief Ignores or Misstates Every Federal Issue in the Case. A close examination of Respondents' Brief shows that they rely on procedural and substantive arguments that are manifestly inconsistent with the Constitution of the United States.

A. Florida Confuses the Question of the Legal Status of a Royalty Interest with its Valuation in this Particular Case. Florida's initial mistake is to pass over without a single mention the bifurcation agreement acknowledged by the trial court (App., at p. 13) under which the only issue at stake in the first phase of the trial was the status of a royalty interest, as opposed to the particular value of this interest. See Petitioner's Brief at 6. Petitioner agreed not to introduce any evidence as to the value of its royalty interest until the status of its interest was determined. Petitioner remains eager to introduce the full range of geological and economic evidence to demonstrate the enormous value of its royalty. Royalty interests are created for long periods of time and benefit from development of new information and technical advances. At the time Ch. 90-72, Laws of Florida, became law in 1990, Coastal had 26 more years to profit from exploration and development.

Nothing in the present record establishes that the market value of Coastal's royalty is zero. Florida makes it appear as though a trial was had on the issue of valuation when it writes "those courts also found, as a matter of fact, the royalty area had no prospect of containing oil in commercial quantities." Respondents' Brief at 10. But Coastal has not received any opportunity to present evidence to rebut that conclusion, which, as the basis of the judgment below, counts as a per se violation of the most elementary principles of procedural due process: a fact cannot be decided against a party who has not been allowed to present evidence on its own behalf. Coastal's royalty cannot simply be taken for lack of value when value had not even been addressed.

B. Florida Suppresses Any Reference to the Standard Good Faith Leasing Obligations Binding on it in this Case. The second fundamental mistake in Florida's response is its

effort to marginalize fundamental issues in this case by referring to its ostensible "unusual facts" [Respondents' Brief at 2, 6] which show "that the particular interest allegedly taken was not 'property' under Florida law." *Id.* at 6. See also, *Id.* at 7. In its view the trial court was correct in finding "that the settlement agreement did not imply a condition that the State would lease land within the royalty area." *Id.* at 3.

What is so ironic about Florida's position is that it relies on the Court's decision in *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1001 (1984). Respondents' Brief at 7. The quoted passage notes that "[p]roperty interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." (emphasis supplied). In *Monsanto*, that proposition was held to mean that the general principles of state trade secret law governed the definition of property interests. In this case it should imply that general principles of state law determine the scope of another intangible interest of sorts, Coastal's royalty. But Florida in this case has consistently disdained its general preexisting rules. Instead, Florida seeks to lift itself by its own bootstraps. It treats as the dispositive rule of property law, the aberrant outcome of the very proceeding it uses to extinguish Petitioner's royalty interest. It utterly fails to point to any prior precedent to support its position, let alone precedents which are "objectively reasonable."

More concretely, nowhere in their Brief do Respondents so much as mention the standard good faith obligations imposed on all owners of property who have conveyed out a royalty interest, or explain why that obligation should be suppressed only in this particular case. The State does so in the teeth of unambiguous state legal authority that protects all royalty interests in Florida law notwithstanding their inherently speculative value. See

Conway Land, Inc. v. Terry, 542 So. 2d 362, 365 (Fla. 1989); *Welles v. Berry*, 434 So 2d 982 (Fla. App 1983).

The well-nigh universal good faith obligation is read into all royalty agreements. Its implication stems from the need to counteract the recurrent conflict of interest between fee owner and royalty holder. Only that obligation prevents the fee owner from doing nothing at all to lease the land. That risk of abuse is as potent with Florida as with any private landowner, yet Florida would have this Court believe that Coastal had signed on to the 1976 settlement knowing that it allowed Florida to close down all activities in the royalty area. No one knew in 1976 if the State would lease those lands in which Coastal had relinquished all rights. But, the whole point of the settlement was to cut Coastal's interest in the royalty area in half, not to extinguish it altogether as in the released areas. See map, App., at p. 55. The basic split in the take from the royalty lands therefore makes perfectly good sense only if the State is bound by the incontrovertible good faith obligations on landowners who have created a royalty interest.

At this juncture Florida's argument thus reduces to the proposition that its own courts can allow it to keep the sweet but escape the bitter of its own solemn agreements. Its opportunistic reinvention of oil and gas law shows the importance of affirming Justice Stewart's concurring opinion in *Hughes v. Washington*, 389 U.S. 290, 298 (1967): "The prohibition against taking private property for public use without just compensation forbids uncompensated confiscation by the judicial and executive branches as by the legislature." L. Tribe, American Constitution Law, p. 589, n. 7, (1988).

C. Florida's Concept of "Property" is Inconsistent With the Takings Clause. Florida next claims that "the

particular interest allegedly taken was not property under Florida law." Respondents' Brief at 6, see also p.2 (emphasis supplied). The role of state common law in interpreting the application of the Fifth Amendment is significant here, but not in the way advanced by Florida.

As discussed, this Court has traditionally resorted to existing rules or understandings that stem from an independent source such as state common law to define the range of interests that qualify for protection as property under the Fifth and Fourteenth Amendments. *Board of Regents of State Colleges v. Roth*, 92 S.Ct. 2701, 2709 (1972) (emphasis supplied). Florida overlooks the concept of "existing" rules and understandings and is, instead, suggesting that the State's own decisions in the same proceeding is the rule which may be used to establish that Coastal's royalty interest does not qualify for protection under the Takings Clause.

Florida has not pointed to a single decision, other than the rulings made in the instant proceeding, which in any way establish that Coastal's royalty interest does not qualify for protection under the Fifth and Fourteenth Amendments. Furthermore, the public trust doctrine as codified in Article X, § 11 of the Florida Constitution does not address whether Coastal's royalty interest qualifies for protection under the Taking Clause or even whether a conveyance of an interest in lands under navigable waters, when authorized by law, is somehow not subject to the protection of the Takings Clause.

In *Lucas*, 112 S.Ct. at 2900, this Court, in discussing the role of the common law in a Takings case, ruled that the limitation on use "cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." Florida's limitations against use of Coastal's property is both

newly legislated and newly decreed, and thus cannot pass this test.

Moreover, in *Lucas*, the Court stresses that the background principles of private law should not be subject to infinite manipulation:

> We stress that an affirmative decree eliminating all economically beneficial uses may be defended only if an objectively reasonable application of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found.

Florida has ignored this explicit warning in this case. It has cited no relevant precedents to show that Coastal's royalty was already excluded from beneficial use under Florida law, and instead has attempted to manipulate this principle by claiming that "[u]nder the unusual facts of this case, the decisions of the state courts [in the instant case] must be read as a determination that Coastal's particular interest was not property under Florida law, or if property, not an interest protected by the U.S. Constitution." Respondents' Brief at 7. Florida has not even attempted to justify the decision below based on background principles of state law. Instead, Florida would bootstrap the decision below into relevant precedent to justify the total taking of Coastal's royalty.

D. Florida Wrongly Asserts that Its Public Trust Doctrine Allows It to Nullify This Conveyance on Submerged Lands at Its Own Will. Florida's last foray into legal self-denial comes from its assertion that Ch. 90-72, Laws of Florida, which bans future oil and gas drilling throughout Florida's Gulf waters, is nothing more than a codification of its prior "public trust doctrine" that treats all submerged lands

as being held in public trust. Once again it relies on the proposition that the "public trust doctrine is an existing rule or understanding" within the meaning of *Monsanto*. Respondents' Brief at 9. It is therefore instructive that the State's brief nowhere quotes the language of the Florida Constitution that purports to give it the right to revoke whatever grants and settlements it chooses just because it wants to. Here Article X, § 11 of the Florida Constitution does nothing to bar the sale of public lands, but explicitly authorizes them: "Sale of such [public trust] lands may be authorized by law, but only when in the public interest." It is this existing rule that controls.

The only question is when that determination of the public interest can be made. Florida will not say so explicitly, but it thinks that it can revise its own view on the public interest as many times as it pleases without paying compensation for any property destroyed in the process. In this case, the public interest determination was made by the Florida legislature in 1944.[1] Next the State sought to rescind the lease in litigation that it lost in state court in 1945. *Watson v. Holland*, 20 So.2d 388 (Fla. 1945). It then sought to rescind the lease in litigation initiated in federal court in 1968 from which the 1976 federal settlement derived.[2] In its

---

[1] Both the Leases and the Memorandum of Settlement were expressly determined by the State to be in the best interest of the State. The State cites *Marine One, Inc. v. Manatee County*, 898 F.2d 1490 (11th Cir. 1990), for the proposition that it may rescind interests in public land without compensation, however as Respondents' Brief recognizes, this case concerns proprietary action, not regulatory action concerning a permit such as in *Marine One*.

[2] Coastal's royalty was created by the 1976 Consent Decree of the United States District Court in and for the Southern District of Florida, Miami Division, incorporating the Memorandum of Settlement. *Coastal Petroleum Co. v. Sec. of Army*, 536 F.2d 1030 (5th Cir. 1976). That final decision modified the unpublished interlocutory order cited by

view, Florida in this particular setting is not bound by the usual principles of res judicata. Three bites at the apple are apparently not enough.

The real principle in this case should be "enough is enough." Florida, or any other state, should not be allowed to wipe out a royalty interest of immense value by pretending that its own public trust doctrine prohibits binding grants of interests in real property (of which a royalty interest is one). No one says that the State cannot introduce sensible conditions to prevent oil leakage and spillage; or that it can condemn the royalty interest for fair value. What this case does raise is the most fundamental question of limited government: may the State take by artifice and declaration property interests that it has validly created in others simply because its legislature, executive and courts want them very much?

Respondents (*Coastal Petroleum Co. v. Sec. of Army*, case nos. 68-951-Civ-CA & 69-699-Civ-CA (S.D. Fla. Feb. 5, 1971)) by providing that no compensation would be required for the State to "use" minerals "other than oil and gas" for a public purpose. (App., at p.50) (emphasis supplied).

CONCLUSION

Certiorari should be granted to review the judgment of the First District Court of Appeal, State of Florida in *Coastal Petroleum Company v. Honorable Lawton Chiles, et al.*, 701 So. 2d 619 (Fla. 1st DCA 1997).

Respectfully submitted,

RICHARD A. EPSTEIN
1111 East 60th Street
Chicago, Illinois 60637
773-702-9563

ROBERT J. ANGERER*
ROBERT J. ANGERER, JR.
ANGERER & ANGERER
Post Office Box 10468
Tallahassee, Florida 32302
850-576-5982

SUSAN W. FOX
Macfarlane Ferguson & McMullen
Post Office Box 1531
Tampa, Florida 33601
813-273-4200

Attorneys for Petitioner
*Counsel of Record

June 12, 1998